

State of California
Regional Water Quality Control Board
San Diego Region

SUPPLEMENTAL
EXECUTIVE OFFICER SUMMARY REPORT
AUGUST 10, 2005

ITEM: 12 c

SUBJECT: Discussion of a Process to establish Marine Sediment Quality Objectives, to establish cleanup levels, and to issue a Cleanup and Abatement Order. The Regional Board will consider whether to amend its Water Quality Control Plan (Basin Plan) to adopt Sediment Quality Objectives prior to issuance of a Cleanup and Abatement Order with final cleanup levels. That Process shall include having the Chair conduct one or more pre-hearing conferences to set procedures for the Cleanup and Abate Order proceeding(s). Action may be taken by the Regional Board.
(John Robertus)

DISCUSSION: The Regional Board Cleanup Team submitted a letter dated August 3, 2005 regarding the proposal for a basin plan amendment. This is Supporting Document No. 4

In a letter dated July 14, 2005 to the Regional Board and all interested parties, the Regional Board Sediment Cleanup Team submitted a letter titled, "Proposed Procedures for Issuance of Cleanup and Abatement Order No. R9-2005-0126". This is Supporting Document No. 5.

These proposed procedures for the issuance of a cleanup and abatement order have prompted a number of responses from the interested parties. These proposed procedures and responses while not a focus of today's discussion would more appropriately be considered at a later time at a pre-hearing conference. The focus of today's discussion is whether a basin plan amendment process is appropriate prior to the issuance of a cleanup and abatement order.

The 5 comment letters are listed below.

SUPPORTING
DOCUMENTS:

4. Cleanup Team letter dated August 3, 2005, Agenda 12-C— Consideration of a Basin Plan Amendment to Develop Marine Sediment Quality Objectives as a Basis for Cleanup Levels".

5. Cleanup Team, letter dated July 14, 2005, "Proposed Procedures for Issuance of a Cleanup and Abatement Order".

6. Sempra Energy, letter dated August 2, 2005, "Statement on Proposed Procedures for Issuance of Order".

7. NASSCO/Latham and Watkins, letter dated August 3, 2005, "Statement of Objections to Proposed Procedures".

8. BP West Coast Products LLC (BP)/Bingham McCutchen, letter dated August 3, 2005, "BP Comments on Proposed Procedures for Issuance Cleanup and Abatement Order No. R9-2005-0126".

9. Chevron USA, Inc./Pillsbury, Winthrop, Shaw, Pittman; letter dated August 3, 2005, "Tentative Cleanup and Abatement Order No. R9-2005-0126".

10. City of San Diego, letter dated August 3, 2005, "Objections to Proposed Procedures".

11. BAE Systems San Diego Ship Repair, Inc. (Formerly Southwest Marine, Inc.), letter dated August 3, 2005, "Proposed Procedures for Issuance of Cleanup and Abatement Order No. R9-2005-0126".

RECOMMENDATION(S): The Executive Officer may have recommendations at the conclusion of the discussion on this item.



California Regional Water Quality Control Board

Supporting Document 4



Alan C. Lloyd, Ph.D.
Agency Secretary

Over 50 Years Serving San Diego, Orange, and Riverside Counties
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Governor

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TO: John Minan
Regional Board Chair

In reply refer to:
MGMT:03 0066.05:A Coe

John H. Robertus
Executive Officer

FROM: Art Coe
Assistant Executive Officer
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

DATE: August 3, 2005

SUBJECT: **AGENDA ITEM 12 C - CONSIDERATION OF A BASIN PLAN
AMENDMENT TO DEVELOP MARINE SEDIMENT QUALITY
OBJECTIVES AS A BASIS FOR CLEANUP LEVELS**

The August 10, 2005 Regional Board Meeting Agenda Item 12c is to include a discussion of a process whereby the Regional Board would adopt a Basin Plan amendment to establish site specific sediment quality objectives for San Diego Bay. As we understand the proposal by the Regional Board Shipyard Sediment Site Advisory Team, this Basin Plan amendment process would be completed prior to initiating the public hearing process for the Regional Board to consider the tentative Cleanup and Abatement Order proposing cleanup requirements and responsible parties for contaminated marine sediments offshore of the NASSCO and Southwest Marine Inc. shipyards (Tentative Order No. R9-2005-0126).

Site-specific sediment quality objectives may eventually be determined to be valuable and necessary tools for protection of water quality in San Diego Bay. However, the Shipyard Sediment Site Cleanup Team recommends that the Regional Board not take the approach recommended by the Advisory Team for the following reasons: (1) this action would be premature in light of the pending State Water Resources Control Board (State Board) action to adopt statewide sediment quality objectives for marine waters; (2) it would significantly delay a process that has already been ongoing for many years; and (3) the benefits of having the site specific sediment quality objectives are nebulous and it is not at all clear that they would mitigate the additional time that would be added to the process of cleaning up the contaminated sediments offshore of the shipyards. Discussion of these points follows.

Adoption of a Basin Plan amendment to establish sediment quality objectives would be premature in light of the pending action by the State Board.

The purpose of site-specific objectives is to address situations where objectives of more general application are in place but are not appropriate or are deficient in some regard. The State Board is under a court mandate to adopt statewide sediment quality objectives by February 28, 2007. This process is well under way, and the Regional Board will have a presentation on the project during the August 10, 2005 meeting. The language for the proposal that the State Board will be considering has not been published and the hearing process has not begun. At this time we do not know what the State Board product will look like or how the Regional Board would be expected to use it. The Regional Board risks wasting a significant amount of time and resources in attempting to develop site specific sediment quality objectives for San Diego Bay without knowing if there will be any need for these site specific objectives after the State Board has acted.

If, in the future, the Regional Board does decide that site specific sediment quality objectives for San Diego Bay or a portion thereof are desirable, there would be a distinct advantage in initiating the project after the State Board has concluded the hearing process and acted on the statewide objectives. Many of the issues, arguments, etc. that would come before the Regional Board should they enter a hearing process to establish site specific sediment quality objectives will be brought before the State Board during their hearing process. In many cases the Regional Board will be able to rely on the State Board's disposition of issues in resolving them at the Regional level.

Undertaking the Basin Plan amendment would significantly delay the cleanup of the contaminated sediments offshore of the NASSCO and Southwest Marine Inc. shipyards.

Based on the information in the agenda package it is not clear if development of sediment quality objectives is being contemplated for San Diego Bay in its entirety or for the segment of San Diego Bay in the vicinity of the NASSCO and Southwest Marine Inc. sites. Development of sediment quality objectives for all of San Diego Bay would be a major undertaking and would require a significant data collection effort to insure that the derived objectives would be applicable to specific sites within the Bay. Such a project would also be highly controversial because of the far-reaching impacts that the objectives would have. The sediment quality objectives would be used to develop prohibitions, limitations, and monitoring requirements for subsequent discharge permits that the Regional Board would issue. The objectives would be a key determinant in future listings of impaired water bodies under the federal Clean Water Act Section 303(d). Finally, they would be used as a consideration in future sediment cleanup initiatives throughout the Bay – to help determine if a cleanup would be necessary and to help establish the cleanup levels. There would be an extensive body of stakeholders who we would expect to participate actively in any such effort. There would be high probability of legal challenges to the adopted Basin Plan amendment. The Regional Board could not expect to successfully undertake such a project without obtaining significant new resources, particularly for the data collection effort and the environmental analysis of the contemplated action.

A project to develop a Basin Plan amendment to include sediment quality objectives for the segment of San Diego Bay in the vicinity of the NASSCO and Southwest Marine Inc. sites would be more manageable. Resources to do the necessary work would still be a problem. We believe there is an adequate pool of data as a result of the work that has been done to date. A Basin Plan amendment establishing sediment quality objectives would have broader application (permitting, impaired water body listings, and other cleanup actions in the immediate vicinity) than cleanup levels for the shipyard site. However, because of the smaller area involved, the stakeholder population and associated controversy would be significantly less than if the entire Bay were to be involved. Notwithstanding the smaller scale of the project, a significant period of time would be required before Basin Plan amendment could be implemented by the Regional Board.

A Basin Plan amendment must be adopted by the Regional Board, approved by the State Board, and approved by the state's Office of Administrative Law. Basin Plan amendments affecting water quality standards for surface waters also require approval by U.S. EPA before they can be considered final, although we have received past guidance that the Regional Board can begin to implement them following approval by the Office of Administrative Law.

We estimate that it would require between 4 and 6 years before a Basin Plan amendment to establish sediment quality objectives for San Diego Bay in its entirety could be processed through the approval by the Office of Administrative Law. A project to develop site-specific sediment quality objectives for the segment of San Diego Bay in the vicinity of the shipyards would require between 2.5 years and slightly in excess of 3 years to reach the same stage. These time estimates assume there would be no remands from the State Board, Office of Administrative Law or U.S. EPA and that there would be no legal challenges. We disagree with the apparent assertion of the Advisory Team that inserting a process to develop a Basin Plan amendment to establish site-specific sediment quality objectives would somehow "fast-track" the cleanup of the contaminated sediments at the shipyard site.

The benefits of having the site-specific sediment quality objectives are nebulous and it is not at all clear that they would mitigate the additional time that would be added to the process of cleaning up the contaminated sediments offshore of the shipyards.

Each of the advantages put forward in support of front-ending the shipyard sediment cleanup process with a Basin Plan amendment process either do not exist or represent only a small theoretical increment of benefit, with no practical value, over the cleanup and abatement order issuance process currently underway. By any measure, the purported advantages of the Basin Plan amendment proposal do not justify delaying the shipyard sediment cleanup process that is already underway.

For example, the assertion that a Basin Plan amendment process would allow for a more objective consideration of the science of setting cleanup levels and enhance opportunities for public participation is misleading. Although Basin Plan amendment proceedings typically have

broader public participation and a wider scope than cleanup and abatement order proceedings, this has little practical significance in the matter of the Shipyard sediment site cleanup. The same public interests would generally participate to the same degree under either the proposed Basin Plan amendment approach or the current cleanup and abatement order approach. The cleanup and abatement order proceedings will be conducted in accordance with laws and regulations contained in Title 23 California Code of Regulations (CCR) Division 3, Chapter 1.5, sections 648, et seq., Chapter 4.5 of the California Administrative Procedure Act (commencing with section 11400 of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. The proceedings will be structured to ensure an orderly, efficient, and impartial administrative process for the development of an appropriate Cleanup and Abatement Order based on scientific factual evidence in the record to the same degree as would occur for the development of sediment quality objectives under the Basin Plan amendment approach. The cleanup and abatement order proceedings will also provide ample opportunity for the public to share information and fully participate in the Regional Board proceedings to essentially the same degree as would occur under the Basin Plan amendment approach.

Another questionable advantage cited for supporting the Basin Plan amendment approach is that the adoption of sediment quality objectives would provide a strong basis for subsequent establishment of sediment cleanup levels in a cleanup and abatement order. The apparent assertion is that establishing cleanup levels in a cleanup and abatement order in the absence of sediment quality objectives would somehow be subject to greater legal challenges. Although a sediment quality objective may provide useful information on the least stringent level of cleanup needed to protect beneficial uses, the applicable state policies and regulations pertaining to establishment of cleanup levels under Water Code section 13304 do not support the notion that establishment of a water quality objective is a desirable prerequisite for establishing a defensible cleanup level. Furthermore the Regional Board has already had great success to date in obtaining complete cleanup or remediation of contaminated sediment sites in San Diego Bay by issuing cleanup and abatement orders with cleanup levels developed in the absence of Basin Plan sediment quality objectives. The Regional Board has to date issued sixty regulatory orders to direct cleanup activities at contaminated sediment sites in San Diego Bay. Most of these Orders were hotly contested at the time they were brought before the Regional Board. To date judicial relief has not been sought by any of the interested parties for any of the Orders.

The Basin Plan amendment approach is also cited as having the advantage of a more deferential judicial standard of review if the sediment quality objectives themselves are challenged. This assertion appears to be based on the premise that judicial deference to Regional Board findings supporting adoption of a Basin Plan sediment quality objective presents a distinct advantage in meeting legal challenges to a cleanup level that is derived from the sediment quality objective. This perceived advantage has little practical value for the cleanup of the contaminated sediments at the shipyard site. Eventually the Regional Board will need to issue a cleanup and abatement order to deal with the cleanup of the contaminated sediments whether or not the Board proceeds with a Basin Plan amendment to establish sediment quality objectives. The Regional Board

would not gain a more deferential standard of judicial review for the cleanup and abatement order if the cleanup level were derived from a sediment quality objective instead of other relevant criteria. Moreover the process for issuing a cleanup and abatement order containing cleanup levels derived from a sediment quality objective would be just as onerous and litigious as it is for the current draft cleanup and abatement order.

Summary.

The Shipyard Site Sediment Cleanup Team recommends that the Regional Board proceed with the hearing process for tentative Cleanup and Abatement Order No. R9-2005-0126 and not consider the matter of site specific sediment quality objectives for San Diego Bay until after the State Board adopts statewide sediment quality objectives for marine waters.

Based on our understanding of the current status of the State Board's effort to develop the statewide sediment quality objectives, it appears that a Regional Board decision on the tentative Cleanup and Abatement Order may trail the State Board's action by as little as six months. We recognize that there may be some concern about acting on the tentative Cleanup and Abatement Order prior to the State Board's mandated February 28, 2007 action because of potential for cleanup levels adopted by the Regional Board being inconsistent with the statewide sediment quality objectives. If this is a concern to the Regional Board we suggest the following alternative process and schedule that would keep the cleanup project moving while the State Board action is pending.

- Regional Board decision on need for cleanup at shipyard site – Fall/Winter 2005/06;
- Regional Board decision on responsible parties should cleanup be determined necessary – Winter/Spring 2006;
- After making decisions on responsible parties the Regional Board would review the status of the State Board's project and decide to either continue their process and consider the matter of cleanup levels or defer that consideration until after the mandated February 28, 2007 State Board action; and
- Any decision to initiate a project to develop site-specific sediment quality objectives could be made after February 28, 2007.

Mr. John Minan
Mr. John Robertus
Agenda Item 12 C

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August 3, 2005

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August 3, 2005

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California Regional Water Quality Control Board

San Diego Region



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July 14, 2005

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In reply refer to:
MGMT:03 0066.05:DBarker
MGMT:03-0137.05: DBarker

Mr. John Robertus
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Dear Chairman Minan and Mr. Robertus:

**SUBJECT: PROPOSED PROCEDURES FOR ISSUANCE OF CLEANUP AND
ABATEMENT ORDER NO. R9-2005-0126**

On behalf of the Shipyard Sediment Cleanup Team, I am submitting the attached *Proposed Procedures for Issuance of Cleanup and Abatement Order No. R9-2005-0126 for Discharges of Waste to Marine Sediment in San Diego Bay Within And Adjacent to Southwest Marine, Inc. and National Steel And Shipbuilding Company Leaseholds Generally Between Sampson Street Extension and Mouth of Chollas Creek*. These proposed procedures ensure an orderly, efficient, and impartial administrative process for the development of an appropriate Cleanup and Abatement Order and provide a fair opportunity for all Parties and interested persons to fully participate in the proceedings. I request that you recommend the Regional Board approve them at the upcoming August 10, 2005 Board meeting.

National Steel and Shipbuilding Company (NASSCO); Southwest Marine, Inc.; City of San Diego; Marine Construction and Design Company and Campbell Industries, Inc.; Chevron, A Subsidiary of ChevronTexaco; BP; San Diego Gas and Electric, a Subsidiary of Sempra Energy Company; and the United States Navy should be recognized as parties to the proceedings automatically. The San Diego Bay Council, a coalition of environmental interest groups that have demonstrated intense interest in the issues involved, also should be designated as a party. A copy of this letter and attached proposed procedures has been sent to these affected parties, as

Mr. John Minan
Mr. John Robertus
Proposed Procedures for Issuance of
CAO No. R9-2005-0126

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July 14, 2005

well as other interested persons for review. A copy is also posted on the Regional Board website at <http://www.waterboards.ca.gov/sandiego>.

The heading portion of this letter includes a Regional Board code number noted after "In reply refer to: " In order to assist us in the processing of your correspondence please include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter.

Please contact me if you have any questions at (858) 467-2989 or via e-mail at DBarker@waterboards.ca.gov.

Sincerely,



David Barker
Supervising Engineer

Enclosures: (1) Proposed Procedures for Issuance of Cleanup and Abatement Order No. R9-2005-0126 for Discharges of Waste to Marine Sediment in San Diego Bay Within And Adjacent to Southwest Marine, Inc. and National Steel And Shipbuilding Company Leaseholds Generally Between Sampson Street Extension and Mouth of Chollas Creek

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CAO No. R9-2005-0126

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July 14, 2005

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

**[PROPOSED]
PROCEDURES FOR ISSUANCE OF**

CLEANUP AND ABATEMENT ORDER NO. R9-2005-0126

for

**Discharges of Waste to Marine Sediment in San Diego Bay Within And Adjacent to
Southwest Marine, Inc. and National Steel And Shipbuilding Company Leaseholds
Generally Between Sampson Street Extension and Mouth of Chollas Creek**

July 14, 2005

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To request copies of Proposed Procedures for Issuance of Cleanup and Abatement Order No. R9-2005-0126 please contact Mr. Michael McCann, Supervising Water Resource Control Engineer at (858) 467-2988, email: MMcCann@waterboards.ca.gov or Mr. John Robertus at (858) 467-2987, email: JRobertus@waterboards.ca.gov.

Documents also are available at: <http://www.waterboards.ca.gov/sandiego>

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[PROPOSED]
PROCEDURES FOR ISSUANCE OF
CLEANUP AND ABATEMENT ORDER NO. R9-2005-0126,
for

Discharges of Waste to Marine Sediment in San Diego Bay Within And Adjacent to
Southwest Marine, Inc. and National Steel And Shipbuilding Company Leaseholds
Generally Between Sampson Street Extension and Mouth of Chollas Creek

A. INTRODUCTION

The Regional Board is considering development and issuance of a cleanup and abatement order for discharges of metals and other pollutant wastes to San Diego Bay marine sediment and waters. On April 29, 2005 the Regional Board circulated for public review and comment a tentative version of the cleanup and abatement order (see tentative Cleanup and Abatement Order No. R9-2005-0126). A copy of this document is posted on the Regional Board website at <http://www.waterboards.ca.gov/sandiego>.

Prior to the issuance of a final cleanup and abatement order in this matter, the Regional Board will first provide an opportunity for all Parties and interested persons¹ to review technical information in the files of the Regional Board and comment on issues pertaining to the proposed cleanup and abatement order and to respond to evidence, documents, and comments submitted by other Parties and interested persons. All technical evidence and documentation that Parties and interested persons would like the Regional Board to consider must be submitted to the Regional Board in writing during this period. The Regional Board will hold public hearings on this matter once all written submittals have been made. The purpose of the public hearings is for the Regional Board to receive final comments from Parties and interested persons and to ask questions regarding written submittals.

The Regional Board's consideration of testimony and written submittals by Parties and interested persons may result in revisions to the current version of tentative Cleanup and Abatement Order No. R9-2005-0126 during the course of the proceedings. Thus the finalized version of the tentative Cleanup and Abatement Order that is ultimately considered for adoption by the Regional Board at the conclusion of the proceedings may differ markedly from the tentative version of the Cleanup and Abatement Order issued on April 29, 2005.

This document, *Proposed Procedures for Issuance of Cleanup and Abatement Order No. R9-2005-0126*, contains procedures applicable to Parties and interested persons participating in the Regional Board's proceedings in this matter. The Regional Board has established these

¹ "Parties" to the proceeding include the persons to whom the tentative cleanup and abatement order is directed, and any other person whom the Regional Board determines should be designated as a party. "Person" includes an individual, partnership, corporation, governmental subdivision or units of a governmental subdivision, or public or private organization or entity of any character.

procedures to ensure an orderly, efficient, and impartial administrative process for the development of an appropriate Cleanup and Abatement Order and to provide a fair opportunity for all Parties and interested persons to fully participate in the proceedings. These procedures will remain in effect until the Regional Board issues a final Order in this matter, unless modified by the Regional Board.

The Regional Board will conduct a pre-hearing conference to address procedural matters. A member of the Regional Board will chair the pre-hearing conference. The Regional Board will not discuss the merits of any substantive issues regarding tentative Cleanup and Abatement Order No. R9-2005-0126 at the conference, including which persons should be required to undertake cleanup and abatement for the marine sediments, or the appropriate level and extent of cleanup and abatement to be required.

B. STATUTES AND REGULATIONS GOVERNING THE PROCEEDINGS

The Regional Board proceedings in this matter will be conducted in accordance with Title 23 California Code of Regulations (CCR) Division 3, Chapter 1.5, sections 648, *et seq.*, Chapter 4.5 of the California Administrative Procedure Act (commencing with section 11400 of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. The hearing will not be conducted as a formal hearing under Chapter 5 of the Administrative Procedure Act (commencing at Government Code section 11500).

Title 23 California Code of Regulations (CCR) can be accessed on the Internet at <http://www.calregs.com> and the California Evidence Code and Government Code can be accessed on the Internet at <http://www.leginfo.ca.gov/calaw.html>.

C. PARTICIPANTS IN THE PROCEEDINGS

Participants in the Regional Board proceedings are either "parties" or "interested persons".

Each Party to the proceeding may present evidence, call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even if that matter was not covered in the direct examination, impeach any witness, rebut adverse evidence, and subpoena, call, and examine an adverse Party or witness as if under cross examination. Each Party may also present non-evidentiary policy statements that may refer to evidence in the record.

Interested persons may submit non-evidentiary policy statements or comments only. Interested persons are not subject to cross-examination but may be asked to respond to clarifying questions from the Regional Board, or others, at the discretion of the Board. Interested persons may not cross-examine other persons participating in the proceedings.

D. PARTICIPANTS DESIGNATED AS PARTIES TO THE PROCEEDINGS

The following list identifies participants who are currently designated as Parties in the Regional Board proceedings on this matter:

1. National Steel and Shipbuilding Company (NASSCO)
2. Southwest Marine, Inc.
3. City of San Diego
4. Marine Construction and Design Company and Campbell Industries, Inc.
5. Chevron, A Subsidiary of ChevronTexaco
6. BP
7. San Diego Gas and Electric, A Subsidiary of Sempra Energy Company
8. United States Navy
9. San Diego Bay Council

All other persons who wish to participate in the proceedings as "Parties" must request designation by the Regional Board. Interested persons seeking recognition as "Parties" must submit a written request for designation as a party to the Regional Board by 4:00 p.m. on the second Friday following promulgation of the Procedures. Requests should be addressed to:

Mr. John Robertus
Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123-4340.

E. REGIONAL BOARD SEPARATION OF FUNCTIONS

The Regional Board staff participating in the proceedings are separated into two groups to help assure the fairness and impartiality of the Regional Board's proceedings.

1. **Sediment Site Cleanup Team:** The Shipyard Sediment Site Cleanup Team (**Cleanup Team**), will assume responsibility for development of a tentative cleanup and abatement order and a supporting Technical Report, evaluating testimony and written submittals from Parties and other interested persons, and presenting evidence and recommendations to the Regional Board on sediment cleanup issues that will be described in a public hearing notice.
2. **Shipyard Sediment Site Advisory Team:** The Shipyard Sediment Site Advisory Team (**Advisory Team**), will assist the Regional Board Chair in matters such as evaluating requests for designated party status, enforcing deadlines and other limitations on written and electronic submissions and exhibits, and preparing for and conducting the proceedings. The Advisory Team will also provide advice to the Regional Board Chair and other Regional Board members in their deliberations on the evidence presented in the proceedings.

Consistent with this separation of functions, members of the Cleanup Team will not have any contact with Regional Board members or members of the Advisory Team on matters relating to the proceedings, except where those contacts are consistent with the limitations on *ex parte* communications described in Section F., Ex Parte Communications.

The following Regional Board staff will serve as members of the Cleanup Team:

Craig Carlisle, Senior Engineering Geologist
Tom Alo, Water Resource Control Engineer
Alan Monji, Environmental Scientist
Peter Peuron, Environmental Scientist
Ben Tobler, Water Resource Control Engineer

David Barker, Supervising Water Resource Control Engineer, will supervise the Cleanup Team. Art Coe, Assistant Executive Officer, will in turn supervise David Barker in this matter. For this matter only, John Robertus, Executive Officer will not be supervising Art Coe, David Barker, or the Cleanup Team. The State Water Resources Control Board, Office of Chief Counsel is assigning John Richards, Senior Staff Counsel to provide legal support to the Cleanup Team.

John Robertus, Executive Officer, and Mike McCann, Supervising Water Resource Control Engineer, will serve as members of the Advisory Team. The Office of Chief Counsel is assigning Phil Wyels, Assistant Chief Counsel to provide legal support to the Advisory Team. Phil Wyels will not be supervising John Richards for this matter.

It is anticipated that the staffing of either or both teams may be increased during the course of the proceedings. Staff assigned to the Advisory Team will not include any individuals who have served as members of the Cleanup Team or who actively participate in formulating the terms and conditions of a tentative cleanup and abatement order or a supporting Technical Report in this matter.

F. EX PARTE COMMUNICATIONS

There shall be no *ex parte* communications, direct or indirect, regarding any substantive issues within the scope of the proceedings, to the Chair of the Regional Board, any other member of the Regional Board, or a member of the Regional Board's Advisory Team, from the Cleanup Team, any Party, or any interested person participant, without notice and opportunity for the Cleanup Team and all Parties to participate in the communication. This rule shall apply during the pendency of the proceedings, commencing no later than the Regional Board's adoption of these procedures.²

² See Government Code sections 11430.10 – 11430.80.

Communications regarding non-controversial procedural matters are not ex parte communications and are not restricted. These communications should be directed to Regional Board Advisory Team Staff or John Robertus, Regional Board Executive Officer.³

G. KEY ISSUES

The Regional Board's decision on development and issuance of a cleanup and abatement order will be based upon the evidence in the files of the Regional Board and the record developed during the proceedings conducted by the Regional Board, including any public hearings held during the course of the proceedings. Parties and interested persons will be invited to submit testimony and other exhibits on the following issues that will be considered by the Regional Board:

1. What Persons Should Be Required to Provide Cleanup and Abatement for Waste Discharged to, or Deposited in, Marine Sediments of San Diego Bay?
2. What Constitutes an Appropriate Approach for Designating "Background" Sediment Quality and Water Quality Conditions for Marine Sediments in San Diego Bay?
3. Is Cleanup to "Background" Sediment Quality Conditions Feasible?
4. If Cleanup to "Background" Sediment Quality Conditions Is Not Feasible, What Alternative Cleanup Levels Will Satisfy the Requirements of State Water Resources Control Board Resolution No. 92-49?
5. What Is The Incremental Benefit Between the Least Stringent Qualifying Cleanup and Each Increment Of Attaining More Stringent Cleanup Levels Compared With the Incremental Cost of Achieving Those Levels?
6. What Time Schedule Should the Regional Board Prescribe for Cleanup and Abatement?

H. ORDER OF PROCEEDINGS

The Regional Board will provide an opportunity for public participation in the development and issuance of the appropriate Cleanup and Abatement Order. Parties and interested persons will be entitled to review and provide written comments on technical information applicable to the relevant issues, and to review and provide written comments on the preliminary tentative Cleanup and Abatement Order. The Regional Board will in turn convene a public hearing to hear testimony from parties and interested persons summarizing their written

³ See Government Code section 11430.20 (b).

submittals. All testimony, technical documentation, and factual information to be considered by the Board must be submitted in writing in advance of the public hearing. Written submittals from a Party must be sent simultaneously to all other Parties. The requirement for pre-submission and service of testimony and exhibits provides the Regional Board and the Parties an opportunity to fully familiarize themselves with the subject of the proposed testimony, prepare for cross-examination, and (in the case of the Parties) to prepare possible rebuttal evidence. The scope of oral testimony at the public hearing will therefore be limited to summarizing the previously submitted written evidence and making policy statements and will be subject to strict time limits. The order of the proceedings is as follows:

1. Cleanup And Abatement Order Technical Report

The Regional Board will issue a public notice announcing the availability, for public review and comment, of a draft Technical Report providing the rationale and factual information supporting the proposed findings and directives of tentative Cleanup and Abatement Order No. R9-2005-0126 (Tentative Cleanup and Abatement Order No. R9-2005-0126 was previously released for public review and comment on April 29, 2005). Forty-five (45) days will be provided for public comment on the Tentative Cleanup and Abatement Order and supporting Technical Report. The public notice will include the deadline for submittal of comments and will contain the provisions described in Item I., Testimony and Other Exhibits below.

2. Written Submittals On Comments Received By The Regional Board

Following the deadline for submittal of comments in Item H.1., above, the Regional Board will issue a second public notice soliciting responses and rebuttal from Parties and other interested persons on the written submittals received by the Regional Board under Item H.1. above. Forty-five (45) days will be provided for response and rebuttal. The public notice will include the deadline for submittals and will contain the provisions described in Item I., Testimony and Other Exhibits below.

3. Public Hearing

Following the submittal of all written comments, responses, and rebuttal, and any technical evidence pursuant to Items H.1. and H.2., above, the Regional Board will provide notice and convene a public hearing to consider testimony, comments, written submittals, and other evidence submitted under Items H.1. and H.2. above. The hearing will be limited to this purpose. The hearing officer will close the hearing when testimony by Parties and other interested persons is concluded; the Regional Board will not allow the introduction of written submittals, evidence, or exhibits following the close of the hearing. The Regional Board will discuss the testimony and other evidence taken at the hearing, either immediately following the hearing or at a subsequent time. The Regional Board will communicate any issues of concern to the Cleanup Team and direct the Team to prepare a technical analysis and tentative Cleanup and Abatement Order (see below) that addresses these issues.

4. Tentative Agenda Documents

The Cleanup Team will prepare Tentative Agenda Documents, comprised of a tentative Cleanup and Abatement Order, and a Technical Report providing the rationale and factual information supporting the findings and directives of the tentative Cleanup And Abatement Order, including responses to evidence and comments received pursuant to Items H.1., H.2., and H.3. The Regional Board will issue a public notice announcing the availability of the Tentative Agenda Documents for public review and comment. The Regional Board will accept only comments addressing revisions made to the tentative Cleanup and Abatement Order and revised Technical Report. Thirty (30) days will be provided for public comment. The public notice will include the deadline for submittal of comments and will contain the provisions described in Item I., Testimony and Other Exhibits below.

5. Public Hearing on Tentative Agenda Documents

The Regional Board will provide notice and convene a second public hearing to consider the written submittals and other evidence submitted under Item H.4. The hearing will be limited to this purpose. The hearing officer will close the hearing when testimony by Parties and other interested persons is concluded; the Regional Board will not allow the introduction of written submittals, evidence, or exhibits following the close of the hearing. The Regional Board will deliberate on the testimony and other evidence taken at the hearing, either immediately following the hearing or at a subsequent time. Pursuant to the outcome of the deliberations the Regional Board may elect to act on the Tentative Agenda Documents described in Item H.4. and issue a final Cleanup and Abatement Order based on the revised tentative Cleanup and Abatement Order. Alternatively the Regional Board may direct the Cleanup Team to make adjustments to the Tentative Agenda Documents and issue an Order at a subsequent Regional Board meeting.

I. TESTIMONY AND OTHER EXHIBITS

Each participant proposing to submit testimony or other exhibits⁴ to be used as evidence, or non-evidentiary policy or comment statements, for consideration by the Regional Board in this proceeding, shall first submit all such information in writing to the Regional Board by 4:00 pm on the last day of the public comment period specified in the applicable public notice. The Regional Board will strictly enforce the deadlines and other procedures on written and electronic submissions and exhibits provided below.

1. Parties

Parties to the proceedings shall submit all written testimony, exhibits, evidence, and supporting technical documentation to the Regional Board in electronic format by 4:00 p.m. on the date specified in the public notice, with 20 paper copies of each document

⁴ Exhibits include written testimony, technical documentation, factual information, expert opinions, statements of qualifications of expert witnesses, and other documents to be used as evidence.

and exhibit for Regional Board use. Each submittal shall include, in both electronic and paper copy formats

- a. A completed Exhibit Identification Index (see Attachment A); and
- b. A Statement of Service for each party with the manner of service for each party indicated..

Parties shall serve one copy of their written submittals and exhibits on every other party on or before the date and time of submittal to the Regional Board. Parties may serve those parties who agree to electronic service with an electronic copy of their written submittals, exhibits, and the forms required under Items I.1.a. and I.1.b.. Parties must serve paper copies of submittals, exhibits, and forms on those parties who do not agree to electronic service. Electronic submissions must be in accordance with the Electronic Submission Format provided below.

2. Document Distribution by Cleanup Team

The Cleanup Team will post a copy of the draft Technical Report described in Item H.1., together with copies of any exhibits, evidence, and supporting technical documentation cited in the Technical Report, and the Tentative Agenda Documents described in Item H.4. on the Regional Board web site. The Regional Board will distribute a copy of the draft Technical Report, or the Tentative Agenda Documents, respectively, to each of the Parties, upon issuance of the public notice announcing the availability of those documents, together with:

- a. A completed Exhibit Identification Index (see Attachment A); and
- b. A Statement of Service for each party with the manner of service for each party indicated.

The Cleanup Team will post any written testimony, exhibits, evidence, and supporting technical documentation submitted by the parties, and any comments submitted by interested persons, on the Regional Board web site for this matter as it is submitted. The Cleanup Team will post any additional technical documentation (*i.e.*, not submitted by parties) relied upon by the Cleanup Team to respond to comments and prepare subsequent versions of the Technical Report on the Regional Board web site for this matter when any such iteration of the Technical Report is made available. The Cleanup Team will distribute documents in electronic format to those parties who agree to electronic service and will distribute paper copies of submittals, exhibits, and forms to those parties who do not agree to electronic service. Electronic distributions will be in accordance with the Electronic Submission Format provided in Item I.4. below.

3. Interested Persons

Interested persons who are not participating as Parties to the proceeding may only submit written non-evidentiary policy statements or comments. Interested persons must submit one copy of all written submittals and exhibits pertaining to policy statements or comments to the Regional Board only. Interested persons may make electronic

submissions to the Regional Board; electronic submissions must be in accordance with the Electronic Submission Format provided below. Interested persons are not entitled to receive service of written submittals and exhibits or other documents served on the Parties to the proceeding.

4. Electronic Submission Format

Any documents submitted or served electronically must be in Adobe™ Portable Document Format (PDF), except for Exhibit Identification Indexes, which must be in a format supported by Microsoft Word 2000 or Microsoft Excel 2000. Electronic submissions to the Regional Board of documents less than 5 megabytes in size may be sent via electronic mail to CAOR9-2005-0126Hearing@waterboards.ca.gov with subject of **"Hearing Exhibit, CAO No. R9-2005-0126, Shipyard Sediment Site."** Electronic submittals to the Regional Board of documents greater than 5 megabytes in size should be sent by mail, in PDF format on compact disk (CD™) media. Electronic service on Parties shall be in the same format as electronic submissions to the Regional Board, but should be submitted to the other Parties by mail on CD.

5. Submittals to the Regional Board

All written paper copy or disk media submittals to the Regional Board shall be addressed as follows:

Mr. John Robertus
Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123-4340

6. Additional Exhibit Requirements

The following additional requirements apply to exhibits:

- a. Exhibits shall be organized and subdivided in sections by the Key Issue topics described in Item G., Key Issues.
- b. Exhibits based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development and operation of the studies or models.
- c. Parties who propose to offer expert testimony must include a statement of qualifications of the expert witness.
- d. Parties must clearly identify any portions of their written submittals that are non-evidentiary policy statements.

- e. The Regional Board may, at the discretion of the presiding officer, take administrative notice of relevant, otherwise admissible, public records of the Regional Board and documents or other evidence that have been prepared and published by a public agency, provided that the original or a copy was in the possession of the Regional Board before the notice of the hearing is issued⁵. A participant offering an exhibit for administrative notice shall advise the other Parties and the Regional Board of the titles of the documents, the particular portions, including page and paragraph numbers, on which the participant relies, the nature of the contents, the purpose for which the exhibit will be used when offered in evidence, and, if applicable, the specific file folder or other exact location in the Regional Board's records where the document may be found.
- f. A participant seeking to enter in evidence, as an exhibit, a voluminous document or database may so advise the other participants prior to the filing date for exhibits, and may ask them to respond if they wish to have a copy of the exhibit. If a participant waives the opportunity to obtain a copy of the exhibit, the participant sponsoring the exhibit will not be required to provide a copy to the waiving participant.
- g. Exhibits that rely on unpublished technical documents will be excluded unless the unpublished technical documents are admitted as exhibits.
- h. Participants submitting large format exhibits such as maps, charts, and other graphics shall provide the original for the hearing record in a form that can be folded to 8 1/2 x 11 inches. Alternatively participants may submit for the hearing record, a reduced copy of a large format original if it is readable.

J. PUBLIC HEARING PROCEDURES

The Regional Board will implement the procedures described below so that the Board can conduct the public hearings in an orderly and expeditious manner.

1. Order of the Hearings

The order of the hearings will be conducted in accordance with the procedures for hearings set forth in Title 23 California Code of Regulations (CCR) Division 3, Chapter 1.5, sections 648 – 649.6 except that the presiding hearing officer (in this case the Regional Board Chair), may modify the order for good cause. Title 23 California Code of Regulations (CCR) can be accessed on the internet at <http://www.calregs.com>.

2. Notice of Intent to Appear

Each Party or interested person intending to present testimony or other evidence at the hearing must submit a completed Notice of Intent to Appear (see Attachment B) to the Regional Board containing the name of each proposed witness, a brief description of the

⁵ See 23 CCR Division 3, Chapter 1.5, section 648.3

proposed testimony of each witness, and an estimate of the time required for each witness to present a brief oral summary of the witness's written testimony. Parties shall also serve one copy of the completed Notice of Intent to Appear to every other Party on the service list provided in the hearing notice following the service procedures described in Item I.1. above. The Notice of Intent to Appear and the Statement of Service for each Party must be received by the Regional Board by 4:00 p.m. on the date specified in the public hearing notice, and served on the other Parties on or before that date.

Parties should indicate how they intend to participate in the hearing by marking the appropriate box on the Notice of Intent to Appear. Parties who do not intend to present a case in chief but who may wish to cross-examine witnesses or present rebuttal should so indicate on the Notice of Intent to Appear. Parties who decide not to present a case in chief after having submitted a Notice of Intent to Appear should notify the Regional Board and other participants as soon as possible.

Failure to submit a Notice of Intent to Appear in a timely manner will be interpreted by the Regional Board as waiver of the right to participate in the proceedings. If there is any change in the schedule of these proceedings, only those who have filed a completed Notice of Intent to Appear will be informed of the change.

3. Oral Testimony Time Limits

The Regional Board will prescribe time limits for Parties and interested persons to present oral testimony based upon the Board's estimate of the time required for each witness to present a brief oral summary of their previously submitted written evidence, policy statements, and comments. The time limits will be defined and described in a public hearing notice that will be issued following the Regional Board's receipt of the written submittals. The time limits will be strictly enforced in order to ensure that all Parties and interested persons have an opportunity to participate in the hearing.

4. Case in Chief Presentation

Each Party to the proceeding may present a case in chief addressing the key issues identified in the hearing notice. The case in chief will consist of any opening statement provided by the Party, oral testimony, introduction of exhibits, and cross examination of the Party's witnesses. The hearing officer may allow redirect examination and recross examination. The hearing officer will decide whether to accept the Party's exhibits in evidence upon a motion of the Party after the case in chief has been completed.

a. *Opening Statements*

At the beginning of a case in chief, the Party may make an opening statement briefly and concisely stating the objectives of the case in chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. Any policy-oriented statements by a Party should be included in the Party's opening statement. At the beginning of a case in chief, the

Party may make an opening statement briefly and concisely stating the objectives of the case in chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. Any policy-oriented statements by a Party should be included in the Party's opening statement.

b. *Oral Testimony*

All witnesses presenting testimony shall appear at the hearing. Before testifying, witnesses shall swear or affirm that the written and oral testimony they will present is true and correct. Any witness providing written testimony shall appear at the hearing and affirm that the written testimony is true and correct. Written testimony shall not be read into the record. Written testimony affirmed by the witness is direct testimony. Oral testimony that goes beyond the scope of summarizing written submittals previously submitted pursuant to Regional Board public notices described in Item H., will be excluded.

c. *Cross-Examination*

Cross-examination of a witness will be permitted on the Party's written submittals (excluding non-evidentiary policy statements), the witness' oral testimony, and other relevant matters. If a Party presents multiple witnesses, the hearing officer will decide whether the Party's witnesses will be cross examined as a panel. Cross-examiners will be subject to time limits set by the hearing officer. The hearing officer has discretion to allow additional time for cross-examination if there is good cause demonstrated in an offer of proof. Any redirect examination and recross examination permitted by the hearing officer will be limited to the scope of the cross-examination and the redirect examination, respectively. Witnesses may be cross-examined on relevant subjects that are not covered in the direct testimony⁶. Ordinarily, only a Party or the Party's representative will be permitted to examine a witness, but the hearing officer may allow a Party to designate a person technically qualified in the subject being considered to examine a witness. Regional Board members and the Regional Board's counsel may ask questions at any time, and the Regional Board members and their Advisory Team staff may cross examine any witness at any time.

d. *Closing Statements and Legal Arguments*

At the close of the hearing or at other times if appropriate, the hearing officer may allow oral arguments or set a schedule for filing briefs or closing statements. If the hearing officer decides to request briefs, the briefs will be due no earlier than 30 days after the estimated date of availability of the Reporter's Hearing Transcript. A Party shall not attach a document of an evidentiary nature to a brief unless the document is at the time in the evidentiary hearing record or is the subject of an offer of the document in evidence.

⁶ See Government Code section 11513 (b).

If the hearing officer authorizes the Parties to file briefs, the Party shall submit 20 copies of the brief in paper copy form and one copy in electronic form to the Regional Board. Parties shall also serve one copy of their brief to every Party on the service list provided in the hearing notice. Parties may serve those Parties who agree to electronic service with an electronic copy of their brief. Parties must serve paper copies of their brief on those Parties who do not agree to electronic service. A statement of service, with manner of service indicated, shall be filed with each Party's exhibits. Electronic submissions must be in accordance with the Electronic Submission Format provided below.

5. Rules of Evidence

Only Parties and other participants who are authorized by the hearing officer will be allowed to present evidence. Evidence will be admitted in accordance with Government Code section 11513. Hearsay evidence may be used to supplement or explain other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

6. Policy Statements

The Regional Board will provide an opportunity for presentation of non-evidentiary policy statements or comments by interested persons who are not Parties to the proceeding⁷. Presentations will be limited to those interested persons who have submitted a completed Notice of Intent to Appear form to the Regional Board, as described in Item J.2., indicating clearly an intent to make only a policy statement or comment. Policy statements from interested persons will be heard after the hearing officer concludes Case in Chief presentations by Parties to the proceedings.

a. *Oral Testimony*

Oral summaries of policy statements will be limited to five minutes or other time limits established by the hearing officer. Oral testimony that goes beyond the scope of summarizing written policy statement submittals previously submitted pursuant to Regional Board public notices described in Item H., will be excluded. Interested persons with similar concerns should participate in a joint presentation of policy statements, and the Regional Board may limit such statements if they are repetitive.

b. *Cross-Examination*

Interested persons are not subject to cross-examination but may be asked to respond to clarifying questions from the Regional Board, or others, at the discretion of the Board or presiding hearing officer. Interested persons may not cross-examine other Parties.

7. Close of Hearing Record

⁷ See 23 CCR Division 3, Chapter 1.5, section 648.1(d).

The Regional Board will not allow the introduction of written submittals, evidence, or exhibits following the close of the hearing.

K. REQUESTS FOR EXCEPTIONS TO THE PROCEDURES

Any requests for exceptions to these procedural requirements shall be filed in writing to:

Mr. John Robertus

Executive Officer

California Regional Water Quality Control Board, San Diego Region

9174 Sky Park Court, Suite 100

San Diego, California 92123-4340

To provide time for other participants to respond, the hearing officer will rule on procedural requests filed in writing no sooner than fifteen days after receiving the request, unless an earlier ruling is necessary to avoid disrupting the hearing.

L. IF YOU HAVE QUESTIONS

Questions concerning these procedures may be addressed to Mr. Michael McCann,

Supervising Water Resource Control Engineer at (858) 467-2988, email:

MMcCann@waterboards.ca.gov or Mr. John Robertus at (858) 467-2987, email:

JRobertus@waterboards.ca.gov.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

CLEANUP AND ABATEMENT ORDER NO. R9-2005-0126ACL

**Discharges of Waste to Marine Sediment in San Diego Bay Within And Adjacent to
Southwest Marine, Inc. and National Steel And Shipbuilding Company Leaseholds
Generally Between Sampson Street Extension and Mouth of Chollas Creek**

**Public Hearing
Exhibit Identification Index**

Name of Party: _____

Exhibit No.	Description	Status of Evidence		
		Introduced	Accepted	By Official Notice

Please provide the information requested below for the attorney, employee, or other person representing the Party named above who completed this form.

Name:			
Organization:			
Address:			
City:	State:	Zipcode:	E-Mail Address
Daytime Phone:	Cell Phone:		Fax

[illegible]

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

NOTICE OF INTENT TO APPEAR IN PUBLIC HEARING

**TENTATIVE CLEANUP AND ABATEMENT ORDER NO. R9-2005-0126,
Discharges of Waste to Marine Sediment in San Diego Bay Within And Adjacent to
Southwest Marine, Inc. and National Steel And Shipbuilding Company Leaseholds
Generally Between Sampson Street Extension and Mouth of Chollas Creek.**

1. PARTY NOTICE OF INTENT TO APPEAR

NOTE: Persons who are designated as "Parties" in the Regional Board proceedings on this matter, and intending to present testimony or other evidence at the hearing, should provide the information requested in this box. "Parties" to the proceeding include the persons to whom the tentative cleanup and abatement order is directed, and any other person whom the Regional Board determines should be designated as a party. The following list identifies participants who are currently designated as Parties in the proceedings: Review "Party" Names from Drop Down List Please do not complete this box if your name or organization is not on this drop down list.

The following Party plans to participate in the public hearing on issuance of Cleanup and Abatement Order No. R9-2005-0126.

Organization: Select "Party" Names from Drop Down List		
Address:		
City:	State:	Zipcode:

- ☐ Select "Party" Names from Drop Down List will present a policy statement only.
- ☐ Select "Party" Names from Drop Down List will participate in cross-examination only.

2. INTERESTED PERSON NOTICE OF INTENT TO APPEAR

NOTE: Interested persons, who are not participating as Parties to the proceeding, and intending to present testimony at the hearing, should provide the information requested in this box. Please do not complete this box if you are designated as a Party in the Regional Board proceedings (See Box 1. PARTY NOTICE OF INTENT TO APPEAR).

The following Interested Person plans to participate in the public hearing on issuance of Cleanup and Abatement Order No. R9-2005-0126.

Name:			
Organization:			
Address:			
City:	State:	Zipcode:	E-Mail Address
Daytime Phone:	Cell Phone:	Fax	

3. WITNESS NOTICE OF INTENT TO APPEAR

Each Party identified in Box 1 or interested person identified in Box 2, intending to present testimony or other evidence at the hearing, must provide the name of each proposed witness appearing on their behalf, a brief description of the proposed testimony of each witness, and an estimate of the time required for each witness to present a brief oral summary of the witness's written testimony. Parties who propose to offer expert testimony must include a statement of qualifications of the expert witness. Please provide the information requested in the table below. If more space is required, please add additional pages.

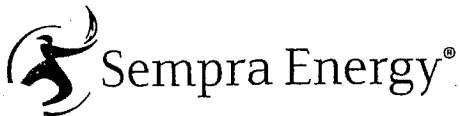
Select Party Name from Drop Down List of Names / plans to call the following witnesses to testify at the hearing:

NAME	SUBJECT OF TESTIMONY	ESTIMATED TIME FOR DIRECT TESTIMONY (Minutes)	EXPERT WITNESS (Yes/No)
			Select Yes or No
			Select Yes or No
			Select Yes or No
			Select Yes or No
			Select Yes or No
			Select Yes or No
			Select Yes or No
			Select Yes or No
			Select Yes or No
			Select Yes or No
			Select Yes or No
			Select Yes or No

4. REPRESENTATIVE INFORMATION

Please provide the information requested below for the attorney, employee, or other person who is representing the Party identified in Box 1 above or the Interested Person identified in Box 2 above.

Name:			
Organization:			
Address:			
City:	State:	Zipcode:	E-Mail Address
Daytime Phone:	Cell Phone:	Fax	



Vincent M. Gonzales
Attorney

555 W. Fifth Street, Suite 1400
Los Angeles, CA 90013-1011

Tel: 213.244.2948
Fax: 213.629.9620
vgonzales@sempra.com

2005 AUG -3 P 1:05

August 2, 2005

VIA OVERNIGHT MAIL

John H. Robertus
Executive Officer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123-4340

**AUGUST 10 BOARD MEETING
AGENDA ITEM 12**

RE: Cleanup & Abatement Order No. R9-2005-0126 Issued by the San Diego Regional Water Quality Control Board ("RWQCB"), on April 29, 2005 ("Order"); Statement on Proposed Procedures for Issuance of Order

Dear Mr. Robertus:

Reference is made herein to (1) the above-captioned Order; and (2) the RWQCB's July 14, 2005 communication proposing procedures for the issuance of the Order (the "Proposed Procedures"). This letter constitutes San Diego Gas & Electric Company's ("SDG&E") written comments on the Proposed Procedures.

SDG&E appreciates the opportunity to review and comment on the Proposed Procedure prior to their consideration by the Regional Board on August 10, 2005. In general, SDG&E believes that the Proposed Procedures represent a significant step by the RWQCB towards ensuring that the process of deliberating and issuing the Order is conducted in as fair and open a manner as possible. Nonetheless, SDG&E believes that these Proposed Procedures can be improved, so that fairness and openness are more effectively ensured.

To begin with, SDG&E believes that the amount of time (45 days) proposed in the Proposed Procedures for both the review of Technical Report and for rebuttal to comments received with respect to the Technical Report, is insufficient. See page 6 of the Proposed Procedures. The 45-day time period is insufficient primarily because it does not allow enough time for SDG&E to fully analyze, understand, and evaluate the RWQCB's arguments and data contained in the Technical Report which, incidentally, has not yet been issued. Furthermore, it does not allow SDG&E enough time to finalize and submit its report on the additional sediment sampling and

John H. Robertus
August 2, 2005
Page 2

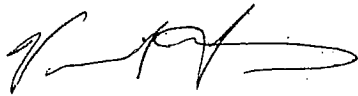
analysis that SDG&E performed last month at the location in the Bay alleged to have been contaminated by SDG&E's operations. This analysis and report will present significant, new and updated information about the sediments in this location. Therefore, SDG&E proposes that instead of 45 days, the Proposed Procedures should set aside at least 90 days for each of these two public review and comment periods. By setting aside 90 days for public review of the Technical Report and another 90 days for public rebuttal on the comments received with respect to the Technical Report, the Regional Board will be assured that the sufficient time and opportunity has been given for the review and evaluation of what will be the key document that forms the basis for this projected \$100 million cleanup.

Secondly, SDG&E hereby incorporates by reference the comments and suggestions made by the attorneys representing the National Steel and Shipbuilding Company ("NASSCO"), in their Statement of Objections to the Proposed Procedures, submitted to the Regional Board contemporaneously with this letter. SDG&E agrees with and endorses all of the changes and improvements recommended by NASSCO to the Proposed Procedures, which are designed to afford full statutory and due process rights to all of the parties named in the Order. SDG&E strongly believes that the changes proposed by NASSCO will also serve the greater good of ensuring that fairness and openness are preserved in this process.

Finally, SDG&E wishes to clarify that its comments regarding the Proposed Procedures do not constitute an acceptance of or an agreement with the findings in the CAO, especially the designation therein of SDG&E as a discharger. SDG&E's objections to the CAO which are set forth in its June 15, 2005 submittal to the RWQCB and the Regional Board still stand and are not being withdrawn in light of its comments herein.

SDG&E reserves its right to supplement or modify this letter and the information contained therein, to the extent it deems necessary. Thank you very much for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Vincent M. Gonzales', with a stylized, flowing script.

Vincent M. Gonzales

600 West Broadway, Suite 11
San Diego, California 92101-3375
Tel: (619) 236-1234 Fax: (619) 696-7419
www.lw.com

FIRM / AFFILIATE OFFICES

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File No. 030815-0000

LATHAM & WATKINS LLP

August 3, 2005

John Minan, Esq.
Chairman
California Regional Water Quality Control Board
San Diego Region 9
9174 Sky Park Court, Suite 100
San Diego, CA 92123

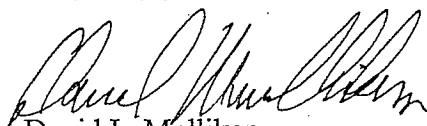
Re: Tentative Cleanup and Abatement Order No. R9-2005-0126

Chairman Minan:

On behalf of National Steel and Shipbuilding Company ("NASSCO"), we are filing the attached Statement of Objections to Proposed Procedures.

Please contact me if you have any questions or comments.

Very truly yours,



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8 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
9 SAN DIEGO REGION

10
11 **IN THE MATTER OF:**

12 NATIONAL STEEL AND
SHIPBUILDING COMPANY
13 CLEANUP AND ABATEMENT
14 ORDER NO. R9-2005-0126
15

ORDER NO. R9-2005-0126
FOR
CLEANUP AND ABATEMENT

PUBLIC HEARING
AUGUST 10, 2005

**STATEMENT OF OBJECTIONS TO
PROPOSED PROCEDURES**

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1 **I. INTRODUCTION AND SUMMARY**

2 National Steel and Shipbuilding Company ("NASSCO") appreciates the improved
3 approach the Regional Board Water Quality Control Board ("Regional Board" or "Board") has
4 taken in its July 14, 2005 Proposed Procedures For Issuance of Cleanup and Abatement Order
5 No. R9-2005-0126 ("Proposed Procedures" or "Procedures"), and recognizes that the Regional
6 Board has responded to concerns raised in various motions and letters to the Board regarding the
7 Draft Cleanup and Abatement Order ("Draft CAO") and associated procedures (see e.g., Letter
8 to John Robertus, dated June 15, 2005; Motion to Compel, dated June 1, 2005; Objections to
9 Public Workshop Agenda, submitted May 12, 2005). NASSCO nonetheless objects to several of
10 the procedural mechanisms proposed in the Procedures, and requests certain additional
11 safeguards be added to the Proposed Procedures in order to ensure protection of NASSCO's
12 constitutional, statutory, and regulatory rights. These objections and procedural requests are
13 presented in detail below.

14 As general matter, NASSCO reserves all procedural rights available to it under
15 federal and state constitutions, statutes, and regulations to the extent they are not expressly
16 protected in the Proposed Procedures. The Regional Board members, in their role as adjudicator
17 of these proceedings, must ensure that these rights are afforded to NASSCO and other parties in
18 an open process, and the Regional Board staff, in its role as a party to these proceedings, must
19 also adhere to all procedural standards and limitations. The role of the Regional Board's
20 Executive Officer should be limited in order to minimize the risk of impermissibly tainting these
21 proceedings. Under relevant statutes and fundamental principles of due process, NASSCO has a
22 right to full discovery, including the right to subpoena Regional Board e-mails and other
23 documents that are germane to these proceedings, and a right to depose Regional Board staff that
24 have been or are currently involved in this matter. NASSCO and other parties must be afforded
25 adequate time both to submit written materials, and to fully present their case before the
26 Regional Board at all hearings. Neither written materials nor oral testimony should be arbitrarily
27 limited to the six key issues identified by the Regional Board staff, so long as the proffered
28 evidence is relevant to the proceedings. Finally, the San Diego Bay Council and other interested

1 persons cannot be named parties to these proceedings, as they have no substantive rights at stake.
2 The ability to present a case-in-chief, cross-examine witnesses, and participate in full discovery
3 must be limited to the persons with a direct legal and financial interest that may be affected in
4 this matter, i.e. those parties at whom the Draft CAO is directed.

5
6
7 **II. ANY REGIONAL BOARD PROCESS SEEKING TO IMPOSE A \$100 MILLION**
8 **CLEANUP ORDER MUST AFFORD FULL STATUTORY AND DUE PROCESS**
9 **RIGHTS TO THE POTENTIALLY RESPONSIBLE PARTIES**

10 **A. The Full Rights Provided In The Code Of Regulations And Administrative**
11 **Procedure Act Must Be Provided In These Proceedings**

12 **1. The Regional Board Must Follow Its Own Statutory And Regulatory**
13 **Mandate**

14 As noted in the Proposed Procedures, Regional Board hearings such as this one
15 are governed by Title 23 of the California Code of Regulation ("CCR"), Division 3, Chapter 1.5,
16 Sections 648, *et seq.* These regulations and the Proposed Procedures themselves expressly
17 incorporate Chapter 4.5 of the California Administrative Procedure Act ("APA") (Cal. Gov't
18 Code § 11400, *et seq.*), as well as Section 11513 of Chapter 5 of the APA (Cal. Gov't Code §
19 11513). NASSCO hereby reserves its rights to every procedural and due process safeguard
20 guaranteed by these provisions as well as the state and federal constitutions. NASSCO generally
21 objects to any aspects of the Proposed Procedures that purport to limit its procedural or due
22 process rights.

23 **2. The Regional Board Is A Party To These Proceedings And Must**
24 **Abide With Its Own Deadlines And Procedural Requirements**

25 The procedural requirements of the CCR and APA sections incorporated by the
26 Proposed Procedures apply to "all *parties* intending to present evidence at a hearing." Cal. Code
27 Regs. tit. 23 § 648.4(b) (2005) (emphasis added). California's APA defines "party" to include
28 "the agency that is taking action." Cal. Gov't Code § 11405.60. Thus, as the Procedures
properly recognize, the Board staff, like NASSCO, is a party to these proceedings, and as such,
is subject to the same procedural requirements applicable under the CCR and APA and Proposed

1 Procedures themselves. Therefore, for example, any testimony or witnesses the Board plans on
2 presenting should be submitted by the appropriate deadlines (i.e., the same deadlines applicable
3 to NASSCO). Board witnesses should also be prepared to be cross-examined by NASSCO and
4 other parties.

5 **3. The Role Of The Executive Officer In Advising The Regional Board**
6 **Should Be Strictly Limited**

7 The Proposed Procedures summarize the separation of functions of the Regional
8 Board. While on the whole NASSCO welcomes this separation of functions and in fact
9 considers it a prerequisite to conducting a fair and just proceeding, there are certain aspects of
10 the arrangement to which NASSCO objects. According to the Proposed Procedures, the
11 Shipyard Sediment Advisory Team ("Advisory Team") will be responsible for (1) "assist[ing]
12 the Regional Board Chair¹ in matters such as evaluating requests for designated party status,
13 enforcing deadlines and other limitations on written and electronic submissions and exhibits, and
14 preparing for and conducting the proceedings;" and (2) "provid[ing] advice to the Regional
15 Board Chair and other Regional Board members in their deliberations on the evidence presented
16 in the proceedings." Proposed Procedures, at pp. 3-4.

17 NASSCO does not object to the Executive Officer's role as an advisor with
18 respect to the first category of Advisory Team tasks – those unrelated to the substantive issues of
19 the case. However, NASSCO does object to the Executive Officer advising the Regional Board
20 as to the second category, their deliberations on the evidence presented in the proceedings.
21 Under the Administrative Adjudication Bill of Rights in the Government Code, "[t]he
22 adjudicative function [of the Board] shall be separated from the investigative, prosecutorial, and
23 advocacy functions within the agency as provided in Section 11425.30." Cal. Gov't Code §
24 11425.10(a)(4). While Section 11425.30 of the Government Code is limited in applicability to
25 presiding officers, due process requires a similar separation for the Executive Officer when
26

27 ¹ To the extent that this statement implies that it is the Regional Board Chair, and not the full
28 Regional Board, that will decide on designated party status, we object to the provision. The
decision to allow parties to intervene is to be decided by the entire board, and the decision is
to be issued in the form of an appealable order, as described more fully below.

1 acting in the manner set forth in the Proposed Procedures. See Nightlife Partners, Ltd. v. City of
2 Beverly Hills, 108 Cal. App. 4th 81, 93 (2003) (“California courts, too, recognize that the
3 combination of prosecutorial and adjudicative functions is the most problematic combination for
4 procedural due process purposes.”).

5 The Executive Officer has headed up the Regional Board staff’s investigatory,
6 prosecutorial, and advocacy efforts to date with respect to the Draft CAO. He has actively
7 participated in the public processes to date, and he signed the first Draft CAO. His placement on
8 the Advisory Team and separation from contact with the Cleanup Team henceforth does not
9 somehow erase those earlier efforts or the knowledge and opinions that the Executive Officer
10 developed prior to the adoption of these Procedures. This predisposition on the part of the
11 Executive Officer with respect to the technical issues of this matter permanently taints his ability
12 to advise the Regional Board members on these issues.

13 The Proposed Procedures laudably recognize the separation of functions by noting
14 that “[s]taff assigned to the Advisory Team will not include individuals . . . who actively
15 *participate* in formulating the terms and conditions of a tentative cleanup and abatement order or
16 a supporting Technical Report in this matter.” (emphasis added) The use of the present tense of
17 the word “participate” cannot disguise the fact that the Executive Officer has actively
18 *participated* in this matter for many years, and may be continuing to do so pending the adoption
19 of the Proposed Procedures. For this reason, NASSCO objects to the Executive Officer’s role on
20 the Advisory Team to the extent that it encompasses the second category of tasks assigned to the
21 Advisory Team (advising the Board on the evidence presented in the proceedings). Mike
22 McCann and Phil Wyels can more than adequately advise the Board on the evidence presented at
23 the hearing without jeopardizing the deliberative process. However, in no instance can the
24 Executive Officer, Mr. McCann, or anyone else act as a super fact-finder for the Board. It is
25 incumbent on the Board itself to weigh the evidence and make a determination on this matter.

1 4. **NASSCO Requests Full Discovery, Including After The Issuance Of**
2 **The Draft Technical Report And After The Tentative Documents Are**
3 **Released**

4 a. **NASSCO Must Be Afforded The Right To Subpoena All**
5 **Documents, Including E-Mails**

6 Due process requires a full right of discovery in administrative proceedings,
7 especially where \$100 million and a potentially massive and far reaching cleanup are at stake.
8 See Mohilef v. Janovici, 51 Cal. App. 4th 267, 302 (1996) (“[B]ecause the due process clause
9 ensures that an administrative proceeding will be conducted fairly, discovery must be granted if
10 in the particular situation a refusal to do so would so prejudice a party as to deny him due
11 process.”) (internal citations and quotations omitted). While the Proposed Procedures provide
12 for disclosure of some documents by the Board staff, discovery mechanisms are not expressly
13 authorized by the Procedures.

14 For example, it is not entirely clear what documents will be made available to the
15 Parties for review. At different places in the Proposed Procedures, it is stated variously that
16 parties will be invited to review “technical information in the files of the Regional Board”; “a
17 draft technical report providing the rationale and factual information supporting the proposed
18 findings;” and “copies of any exhibits, evidence, and supporting technical documentation cited in
19 the Technical Report” on the Regional Board’s website. NASSCO requests that the Regional
20 Board clarify precisely what level of document review is being authorized by the Procedures.
21 Equally important is NASSCO’s right to understand what evidence the Regional Board staff
22 considered and rejected in formulating the Draft CAO. To date, the staff has not provided *all* of
23 the evidence in the record, including the evidence, if any, that it discounted.

24 NASSCO objects to any document production or review that does not include all
25 files and documents the Regional Board possesses that pertain to the Draft CAO and these
26 proceedings. The production must include relevant e-mails of staff members that have been
27 involved in the sediment investigation or the development of the Draft CAO.
28

1 **b. NASSCO Requests Regional Board Staff To Be Available For**
2 **Depositions**

3 NASSCO further demands that Regional Board staff be available for depositions
4 prior to the hearing, and indeed, prior to the deadlines for submitting evidence. NASSCO has a
5 right to depose Regional Board staff, including if necessary the Executive Officer, based on the
6 generalized due process need for discovery in a proceeding of this magnitude. See Mohilef v.
7 Janovici, 51 Cal. App. 4th 267, 302 (1996) (“[B]ecause the due process clause ensures that an
8 administrative proceeding will be conducted fairly, discovery must be granted if in the particular
9 situation a refusal to do so would so prejudice a party as to deny him due process.”) (internal
10 citations and quotations omitted).

11 The right to depose witnesses in Regional Board proceedings is also specifically
12 conferred by California Water Code (“CWC”) Section 1100. Section 1100 states:

13 The board or any party to a proceeding before it may, in any
14 investigation or hearing, cause the deposition of witnesses residing
15 within or without the state to be taken in the manner prescribed by
16 law for depositions in civil actions in the superior courts of this
state....

17 Section 1075 of the CWC defines proceeding as “any inquiry, investigation, hearing,
18 ascertainment, or other proceeding ordered or undertaken by the board pursuant to this code.”
19 The Draft CAO proceedings unquestionably fit this definition, and as such, the Proposed
20 Procedures must allow for depositions.

21 Depositions will allow Respondents to utilize more efficiently the allocated time
22 at the hearing. Specifically, testifying witnesses and Board staff most knowledgeable about
23 sediments, the drafting of the CAO, and the preparation of technical reports and supporting
24 documents must be available to be deposed. In addition, any witnesses planning to testify or
25 submit evidence, including San Diego Bay Council (“Bay Council”), must be made available for
26 depositions. Though NASSCO presumes that such a right exists under the Proposed Procedures,
27 there is no explicit mention in the Procedures of the right to depose witnesses, nor is an
28 accounting made for the time that will be required to schedule and take the depositions. As

1 discussed below, the time required for conducting depositions should be factored into the
2 schedule of Proposed Procedures.

3 **B. The Regional Board Must Clarify Or Modify Several Aspects Of The**
4 **Proposed Procedures In Order To Ensure Due Process Is Afforded To The**
5 **Parties**

6 **1. Time Schedules, Including The Time Allotted To Submit And**
7 **Respond To Written Comments, Should Be Established Through The**
8 **Pre-hearing Conferences**

9 Without knowing what the Draft Technical Report and supporting documents will
10 consist of, it is impossible for the parties (including the Regional Board Cleanup staff) to know
11 how much time will be required for submission of written materials. It is similarly impossible to
12 know how much time will be required for response and rebuttal to written submittals, or for
13 submitting comments on the Tentative Technical Report and CAO. Rather than attempt to
14 arbitrarily set time periods now, the Regional Board should establish the deadlines for written
15 submittals at the pre-hearing conference(s), taking into account the input from the parties. At
16 that stage, the parties, including the Regional Board, will have a better understanding of the time
17 that will be needed to complete adequate written submittals.

18 **2. At A Minimum, NASSCO Requests Additional Time For Submittal**
19 **Of Comments After Issuance Of The Draft Technical Report And**
20 **Again After The Tentative Documents Are Released**

21 NASSCO respectfully requests that the Regional Board provide additional time
22 for submittal of written comments, both after the draft Technical Report is released, and after the
23 Tentative Agenda Documents are released. In current form, the Proposed Procedures allow 45
24 days from the release of the draft Technical Report, 45 days for response and rebuttal to
25 submitted comments, and 30 days from the release of the Tentative Agenda Documents, before
26 which comments must be submitted to the Board and other parties. NASSCO objects to the
27 limits imposed at each stage of the proceedings.²

28 ² Although it is impossible at this stage of the proceedings to determine how much time will be
needed to file comments, it should in no event be less than 90 days.

1 As discussed in Section II(A)(4) of this brief, these proceedings will require
2 extensive discovery, including review of all Regional Board documents and e-mails pertaining to
3 this matter, and the taking of depositions. The discovery cannot take place until after the draft
4 Technical Report and supporting documents are made available to the parties. Forty-five days is
5 not sufficient to perform discovery, including depositions, and submit written comments to the
6 Board. The analysis is similar with respect to the Tentative Agenda Documents. Though
7 discovery will likely be less of a factor at this stage in the proceedings (this cannot be known
8 with certainty until the Tentative Documents are released), NASSCO and the other parties will
9 require more than 30 days to craft written responses to a CAO which at least in current form
10 contemplates a \$100 million cleanup.

11 Moreover, the situation does not demand urgency. The *NASSCO and Southwest*
12 *Marine Detailed Sediment Investigation* ("Sediment Report"), prepared under the direction and
13 guidance of the Regional Board, was submitted in October 2003. In light of the 18-month period
14 for the Regional Board staff to review that report and prepare the Draft CAO, there is no reason
15 to deny Parties the additional time they need and deserve under principles of due process to
16 adequately respond. We therefore respectfully ask for additional time for submittal of written
17 comments on the Draft and Tentative Documents. The precise amount of additional time needed
18 should be determined in connection with the pre-hearing conference.³

19 **3. NASSCO Requires Sufficient Time To Present Evidence At The**
20 **Proceedings Before The Board**

21 NASSCO is not opposed to many of the suggested procedures governing the
22 Public Hearing, including the concepts that written testimony need not be read into the record,
23 that written testimony affirmed by a witness is direct testimony, and that oral testimony does not
24 fall outside the scope of previously submitted written materials. However, oral testimony cannot
25 be limited to merely "summarizing written submittals previously submitted." At any proceeding
26 in this matter, the PRPs must receive sufficient time to present evidence regarding the Draft

27 ³ Once appropriate deadlines for written submittals are established, the deadlines should be
28 enforced by the Regional Board on the basis of the date the submittal is received by the
Board, not the date identified on the document by the person submitting it.

1 CAO. See Cal. Gov't Code § 11425.10(1) (2005) ("The agency shall give the person to which
2 the agency action is directed notice and an opportunity to be heard, including the opportunity to
3 present and rebut evidence."); see also Matthews v. Eldridge, 424 U.S. 319, 333 (1972) ("The
4 fundamental requirement of due process is the opportunity to be heard at a meaningful time and
5 in a meaningful manner."). The amount of time to be provided to NASSCO at any hearing must
6 correspond with the complexity of the record, the enormous potential impact to NASSCO, as
7 well as the extensive defects and shortcomings of the Draft CAO and supporting documentation.
8 Anything less would fail to provide NASSCO with an "opportunity to be heard" and would not
9 be "meaningful."

10 To be clear, parties must be allowed to do more than "summarize" direct
11 testimony. Because of the adjudicatory nature of the proceedings, due process principles require
12 a meaningful opportunity to be heard.⁴ Under Sections 648(b) and 648.5, and Section 11513(b)
13 of the Government Code, the Board must allow Parties to present their own evidence; this
14 includes the calling and questioning of witnesses. Section 648.5 states that the order of
15 proceedings shall include the "[p]resentation of evidence by the parties." Cal. Code Regs. tit. 23,
16 § 648.5(a)(5) (2005). The Government Code states that each party shall have the right "to call
17 and examine witnesses." Cal. Gov't Code § 11513(b). Designated parties, then, must be given
18 the opportunity to present and question witnesses, and cross-examine opposing witnesses, not
19 simply "summarize" the evidence.

20 The Code of Regulations states,

21 The hearing notice may require that all parties intending to present
22 evidence at a hearing shall submit the following information to the
23 Board prior to the hearing: the name of each witness whom the
24 party intends to call at the hearing, the subject of each witness'
25 proposed testimony, *the estimated time required by the witness to*
26 *present direct testimony*, and the qualifications of each expert
27 witness.

28 ⁴ See Cal. Gov't Code § 11425.10(a)(1), *supra*; see also Horn v. County of Ventura, 24 Cal. 3d 605, 612 (1979)
("Due process principles require reasonable notice and opportunity to be heard before governmental deprivation
of a significant property interest.")

1 Section § 648.4 (emphasis added). It is not yet possible for NASSCO to make an estimate of the
2 time it will need at the various hearings, nor is it required to make an estimate at this time. At a
3 minimum, due process requires that NASSCO and the other PRPs receive at least the same
4 opportunity as Regional Board staff and other parties to address the Draft CAO and forthcoming
5 Technical Report. NASSCO will make a specific request for a sufficient amount of time at an
6 appropriate time prior to any hearing in these proceedings. If at that time the Board does not
7 provide the appropriate amount of time to constitute a reasonable opportunity to be heard,
8 NASSCO will make an offer of proof.

9 **4. The Issues Cannot Be Arbitrarily Limited To Just The Six Issues**
10 **Proposed By The Regional Board Staff**

11 **a. The Issues Mistakenly Presume Some Level Of Cleanup Is**
12 **Required, And Additional Issues May Arise**

13 Evidentiary submittals and testimony cannot be limited to the six issues pre-
14 selected by Regional Board staff. The Parties at whom this order is directed were not given any
15 opportunity to provide input as to the issues. It is particularly prejudicial to limit the issues of
16 the proceeding before any party has had the opportunity to review the forthcoming Technical
17 Report and evidence in support thereof, not to mention the information that may be obtained
18 during the discovery phase of these proceedings. Similarly, upon issuance of the revised
19 Tentative CAO, a host of new issues and concerns may arise.

20 The issues identified in the Proposed Procedures are further flawed because all of
21 them *presume* that it is appropriate to issue a Cleanup and Abatement Order. There are several
22 threshold issues that must first be addressed before the Board ever reaches the six issues
23 described in the Procedures. They include, but are not limited to:

- 24 (1) Should *any* Cleanup and Abatement Order be issued for the shipyard
25 sediment?
- 26 (a) What, if any, legal authority does the *Regional Board* have to
27 regulate *sediment* quality, as opposed to *water* quality?
- 28 (b) What evidence, if any, in the record would support the issuance of
the tentative CAO?

1 (c) What evidence, if any, contradicts the evidence, findings, and
2 conclusions of the Sediment Report?

3 (2) Assuming any cleanup or abatement is legally and factually justified:

4 (a) Does State Board Resolution 92-49 provide a supportable legal
5 basis for requiring cleanup of *sediment*, and if so, how should the
6 factors for alternative cleanup levels be evaluated in light of the
7 significant distinctions between sediment and water quality?

8 (b) Is there a supportable legal basis requiring a presumption of
9 cleanup to background *sediment* conditions?

10 (c) Should cleanup be required where sources unrelated to the
11 shipyards have not been controlled?

12 (d) Is there a supportable legal basis for the Regional Board to require
13 remediation (dredging) of sediment where the effects of discharge
14 can be abated through other means?

15 (e) Can the Regional Board discriminate in enforcement in adopting
16 markedly different cleanup levels (by orders of magnitude) for
17 marine sediments at similar sites within San Diego Bay?

18 Finally, the issues as drafted by the Regional Board staff must be revised. For
19 example, the fifth issue should state "What is the incremental benefit between the least stringent
20 cleanup level (natural attenuation), and each increment of attaining more stringent cleanup levels
21 compared with the incremental cost of achieving those levels." Moreover, in light of the
22 preliminary issues defined above, the text of the existing issues in the Procedures should be
23 preceded with the phrase "Assuming any cleanup or abatement is legally and factually
24 justified...."

25 Thus, NASSCO objects to any attempt by the Regional Board to exclude an offer
26 of evidence or testimony simply because it does not fit into one of the six categories, so long as it
27 is relevant to the proceeding.

28 **b. Parties That Are Potentially Subject To The Duties And
Conditions Of The Order Need Not Distinguish Policy
Statements From Evidentiary Offerings**

Item number 6 on Page 9 of the Proposed Proceedings suggests that Parties must
"clearly identify" portions of their written submittals that are non-evidentiary policy statements.

1 This requirement, like the requirement to assign evidence and testimony to one of six pre-
2 assigned categories, is unnecessary and creates significant logistical challenges. For example, a
3 NASSCO submission about the appropriate level of cleanup based on the available evidence is at
4 once a statement about cleanup policy and an analysis of the evidence. Therefore, NASSCO
5 objects to any attempts by the Regional Board to penalize NASSCO or exclude an offer of
6 evidence or testimony based on the label applied to the proffered evidence or testimony. Under
7 the Board's regulations, only the testimony of interested persons can be limited on the basis that
8 it is a policy statement.⁵

9 **5. NASSCO Must Be Allowed To Question Interested Persons**
10 **Presenting Evidence**

11 Respondents further object to certain provisions regarding the conduct of the
12 hearing with respect to interested persons. Respondents reserve the right to cross examine
13 "interested persons" that provide, in their comments, any testimony other than general policy
14 statements (e.g., if they present evidence). Under the Code of Regulations,

15 The Board or presiding officer may provide an opportunity for
16 presentation of *policy* statements or comments, either orally or in
17 writing, by interested persons who are not participating as parties
18 in the proceeding. Persons presenting *nonevidentiary* policy
19 statements will not be subject to cross-examination but may be
asked to respond to clarifying questions from the Board, staff, or
others, at the discretion of the Board or presiding officer.

20 Cal. Code Regs. tit. 23, § 648.1(d) (2005) (emphasis added). It follows, then, that interested
21 persons presenting more than policy statements (e.g., evidence) may be cross-examined.
22 NASSCO reserves the right to do so.⁶

23
24
25 ⁵ CCR § 648.1(d).

26 ⁶ For example, if any person wishes to appear before the Board and argue the quality of the
27 sediment at the shipyards, any alleged impacts of the sediment on human health or the
28 environment, or anything other than general policy statements, NASSCO reserves the right to
cross examine that person (and to depose the person prior to the hearing). Without such
right, NASSCO will be unable to test the witnesses' bases for their statements, their veracity,
etc.

1 **6. NASSCO Requests Additional Limitations On The Number Of Copies**
2 **That Must Be Submitted**

3 NASSCO appreciates the provisions of the Proposed Procedures which attempt to
4 streamline the document reproduction and distribution process, including the use of electronic
5 service, administrative notice of public records, and the option for parties to waive service of
6 voluminous documents. The Proposed Procedures nonetheless require each Party to submit
7 twenty paper copies to the Board of all direct testimony, exhibits, excerpts of documents or
8 evidence, and all other documents to be added to the administrative record. Moreover, each
9 designated party must be served copies of the same items. This currently requires NASSCO to
10 provide an additional eight copies, and the Board is considering granting other interested persons
11 "Party" status. In total, the Parties are being asked to provide roughly 30 total copies of every
12 document submitted to the Board. This is extremely burdensome and unnecessary.

13 While NASSCO is willing to provide 20 copies to the Board and a copy to each
14 designated party of their direct testimony and supporting legal and policy arguments (i.e., each
15 affidavit or legal brief), NASSCO objects to the requirement to provide 30 copies of all
16 supporting materials. Two copies of all such materials for the Board should be sufficient. This
17 would allow one original copy for Board review, and one copy for the Board staff to make
18 available for copying by other designated parties or interested persons pursuant to Board policy.
19 As suggested on page 8 of the Proposed Procedures, each party can provide to all other
20 designated parties a completed Exhibit Identification Index of all documents produced to allow
21 each party to determine which documents they would like to obtain from the Board. NASSCO is
22 also agreeable to providing electronic copies of larger documents. Furthermore, NASSCO
23 understands that all documents currently in the record, including the Sediment Report, will not
24 be subject to re-distribution by NASSCO.

25 **7. Board Deliberation Must Be In The Public Forum, And The Board**
26 **Must Disclose All Comments To All Parties, Not Merely To The**
27 **Cleanup Team**

28 On page 6, the Proposed Procedures suggest (although it is unclear) that the Board

1 may meet separately to discuss the case following the first evidentiary hearing. NASSCO
2 objects to any such closed door discussions by the Board members. Agency proceedings such as
3 this one must be conducted in the public forum; deliberations cannot take place in a closed
4 session.

5 The California Attorney General has issued an opinion on this specific issue in the
6 air quality context, finding such conduct would violate the Ralph M. Brown Act (Cal. Gov't
7 Code §§ 54950, et seq.), which requires open public meetings. See 71 Op. Atty Gen. Cal. 96.

8 The specific issues addressed by the Attorney General were:

9 Does the Ralph M. Brown Act require the deliberations of a hearing board of an
10 air pollution control district, after it has conducted a public hearing on a variance,
11 order of abatement, or permit appeal, to be conducted in public? If so, may the
board deliberate in private after such public hearings with the board's legal
counsel, or the board's attorney member?

12 Id. at 96. The Attorney General concluded that:

13 The Ralph M. Brown Act does require the deliberations of a hearing board of an
14 air pollution control district, after it has conducted a public hearing on a variance,
15 order of abatement or permit appeal, to be conducted in public. The act prohibits
the hearing board from conducting such deliberations in private with the board's
counsel or the board's attorney member.

16 Id.

17 The decision was cited favorably in subsequent Attorney General Opinions. See
18 73 Cal. Op. Att'y Gen. 1, at 2; 80 Cal. Op. Att'y Gen. 231, at 234. The AG opinion is equally
19 persuasive in this context. Deliberation by an air pollution control district hearing board on an
20 order of abatement is nearly identical to deliberation by the Regional Board on a Cleanup and
21 Abatement Order. Hence, the Regional Board's deliberations on this matter must take place in
22 the public forum.

23 Similarly, the Board members' communications on all matters, whether
24 characterized as a preliminary conclusion or final decision, must be directed to all Parties, not
25 just to the Cleanup Team. In numbered paragraph 3 at the bottom of page 6 of the Proposed
26 Procedures, the Regional Board notes that after the first hearing, the Regional Board "will
27 communicate any issues of concern to the Cleanup Team and direct the Team to prepare a
28

1 technical analysis⁷ and tentative Cleanup and Abatement Order....” It is not clear whether the
2 contemplated communication would be oral or written, or what the nature of the communication
3 might be. NASSCO requests a clarification of this sentence, and objects to any communication
4 from Board members to Staff that is in the nature of a decision or conclusion on the evidence
5 then before the Board that is not directed to all parties.

6
7 **8. NASSCO Requests That The Regional Board Clarify Various**
8 **Provisions Of The Proposed Procedures**

9 On Page 1 of the Proposed Procedures, the Regional Board states that “the
10 purpose of the public hearings is for the Regional Board to receive final comments from Parties
11 and interested persons and to ask questions regarding written submittals.” This does not
12 accurately characterize the nature and purpose of these proceedings, which are adjudicatory. The
13 purpose of the public hearings is to allow the Parties to present evidence concerning the draft
14 CAO and the basis (or lack thereof) for it, and to permit direct and cross-examination of
15 witnesses, including Regional Board staff. NASSCO requests that this sentence regarding the
16 purpose of the proceedings be modified or stricken from the Proposed Procedures.

17 Page 2 of the Proposed Procedures mentions that a pre-hearing conference will be
18 held to address procedural matters. NASSCO welcomes the opportunity for a pre-hearing
19 conference, and simply requests that the Regional Board clarify when and how it will take place.
20 It is not clear whether the pre-hearing conference referred to will be held prior to the August 10,
21 2005 hearing on the Proposed Procedures, whether “pre-hearing conference” is a reference to the
22 August 10, 2005 meeting itself, or whether it is referring to a conference to be held before one or
23 both of the hearings scheduled in the Proposed Procedures. NASSCO requests that pre-hearing
24 conferences be held before both of the proposed hearings and any other hearing at which the
25 parties will be given an opportunity to present testimony and evidence.

26
27
28 ⁷ We presume this to mean a revision of, or addendum to, the draft Technical Report that the
Cleanup Team is to issue prior to the first hearing, though this assumption should be clarified
by the Board.

1 **C. Persons Designated As Parties To These Proceedings Should Be Strictly**
2 **Limited To Persons That Are Potentially Subject To The Provisions Of The**
3 **Draft Order**

4 NASSCO objects to the designation or proposed designation of Bay Council as a
5 party to these proceedings. Bay Council has not met or even attempted to meet the statutory
6 standard that the Regional Board must apply when determining whether to designate parties in
7 addition to the persons to whom the Board's action is directed. Moreover, the Regional Board
8 should not grant party status to any person whose legal rights would not be substantially affected
9 by the outcome of these proceedings. Stated another way: only persons that are at least
10 potentially affected by the obligations and conditions of the Draft CAO should be granted party
11 status and be permitted to participate in these proceedings alongside those already named
12 potentially responsible parties ("PRPs").

13 **1. The Regional Board Has Not Adhered To Its Own Standards In**
14 **Designating The San Diego Bay Council A Party To These**
15 **Proceedings**

16 The Regional Board staff has suggested that the San Diego Bay Council ("Bay
17 Council") "should be designated as a party" to these proceedings (Transmittal Letter For
18 Proposed Procedures). The Proposed Procedures go further and state that Bay Council is
19 "currently designated" as a Party in these proceedings. (Proposed Procedures, at 3) In
20 purporting to make this designation, the Regional Board staff has failed to adhere to its own
21 regulatory and statutory mandate with respect to designating parties, and the Cleanup Team has
22 gone beyond its role as advocate and has assumed a role that only the Board members
23 themselves can assume.

24 Other than the Regional Board's assertion in its transmittal letter that Bay Council
25 has "demonstrated intense interest in the issues involved," the Regional Board has given no
26 indication why it has granted Bay Council Party status. However, in Footnote 1 to the Proposed
27 Procedures, the Regional Board defines "Parties" to the proceeding as "the persons to whom the
28 tentative cleanup and abatement order is directed, and any other person whom the Regional
Board determines should be designated as a party." This language is nearly identical to that in

1 Section 648.1(a) of the CCR sections that govern State and Regional Board adjudicatory
2 proceedings. Regional Board is no doubt relying on this broad language in Section 648.1(a) to
3 support its assertion that Bay Council, or other groups, may qualify as Parties to this proceeding.

4 This reliance is misplaced. While the Regional Board may be authorized to
5 “determine” the additional persons that should be designated as parties, they do not have a
6 boundless discretion to do so, nor are they relieved from their obligation to make an actual
7 determination. The Regional Board cannot grant any person that shows an interest, intense or
8 otherwise, “party” status and allow that person to cross-examine NASSCO and other parties that
9 are potentially subject to the Draft CAO. The Board’s discretion necessarily is limited by
10 provisions in California’s Administrative Procedure Act (“APA”). As previously noted, both the
11 CCR sections governing these proceedings and the Proposed Procedures themselves expressly
12 incorporate Chapter 4.5 of the APA (Cal. Gov’t Code § 11400, *et seq*). Chapter 4.5 of the APA
13 includes Section 11440.50, which states “section [11440.50] applies in adjudicative proceedings
14 of an agency if the agency by regulation provides that this section is applicable in the
15 proceedings.” Again, the regulations governing Regional Board proceedings expressly make
16 Section 11440.50 applicable. Section 11440.50 establishes a three-prong test for determining
17 whether a person may intervene into an agency’s adjudicative proceedings.

18 First, the applicant for intervention must submit a written motion to the agency,
19 with copies served on all parties named in the agency’s pleading. The motion is to be made as
20 early as practicable in advance of the hearing, and if there is a prehearing conference, the motion
21 to intervene should be served in advance of the conference, and be resolved at the conference.
22 Cal. Gov’t Code §§ 11440.50(b)(1), (2). To our knowledge, Bay Council has never submitted
23 any written motion to the Regional Board requesting status as a Party. If such a motion exists,
24 then it was not properly submitted since, as described above, any such request should have been
25 served upon all Parties to these proceedings. NASSCO has never received a copy of any motion
26 from Bay Council requesting intervention; if NASSCO had received a motion from Bay Council,
27 it would have immediately objected.

1 If designation as a party were as simple as submitting a written request, then the
2 Regional Board could theoretically cure its procedural error by having Bay Council submit a
3 motion requesting intervention. However, the second prong of the APA intervention standard
4 requires a person wishing to intervene to present facts “demonstrating that the applicant’s legal
5 rights, duties, privileges, or immunities will be substantially affected by the proceeding or that
6 the applicant qualifies as an intervenor under statute or regulation.” Cal. Gov’t Code §
7 11440.50(b)(3). Bay Council’s alleged “intense interest in the issues involved” simply cannot
8 suffice to meet this prong of the APA standard. Environmental groups, industry groups, and
9 other organizations throughout the country conceivably could have a strong interest in the
10 “issues involved” in these proceedings. However, they should not all be designated as Parties to
11 these proceedings. Shipbuilders, port authorities, petroleum terminal operators, trade groups,
12 associations, municipalities, and other entities throughout the region undoubtedly have “an
13 intense interest in the issues involved” in these proceedings. Logic dictates that a mere interest
14 in the issues involved is not sufficient to bestow Party status on Bay Council or any person not
15 potentially subject to the conditions or consequences of the Draft CAO. Bay Council does not
16 own property in or around the proposed cleanup area. Its interests are not sufficiently distinct
17 from the public-at-large. Bay Council plainly cannot meet the APA’s requirement that an
18 intervenor’s “legal rights, duties, privileges, or immunities will be substantially affected by the
19 proceeding,” nor have they even attempted to state facts demonstrating that they satisfied this
20 prong.

21 Moreover, any generalized interest that Bay Council has in the outcome of these
22 proceedings is adequately protected by the staff of the Regional Board’s Sediment Cleanup
23 Team. Under the Porter-Cologne Water Quality Control Act (CWC § 13000 et seq), it is the
24 State and Regional Water Boards that are charged with regulating waters “to attain the highest
25 water quality which is reasonable, considering all demands being made and to be made on those
26 waters and the total values involved, beneficial and detrimental, economic and social, tangible
27 and intangible.” (CWC § 13000) Since groups like Bay Council are neither responsible for
28 performing the delicate balance required by CWC Section 13000, nor substantially affected by

1 the outcome of this proceeding, they cannot be afforded Party status in these proceedings.
2 Rather, they are properly granted a role as an interested person, as per CCR Section 648.1(d).

3 The third and final prong of the APA standard for intervention requires the
4 presiding officer to make a determination “that the interests of justice and the orderly and prompt
5 conduct of the proceeding will not be impaired by allowing the intervention.” Cal. Gov’t Code §
6 11440.50(b)(4). On this prong as well, the Regional Board has not and cannot make the
7 determination that the designation of groups like Bay Council will not impair orderly and prompt
8 conduct of the proceeding. As already noted, the Regional Board Cleanup Team is statutorily
9 authorized and fully capable of representing any interests Bay Council may have in the water
10 quality of San Diego Bay. Adding additional parties with no financial or legal stake in the matter
11 necessarily takes time away from the ability of the true parties to this matter (the PRPs and the
12 Regional Board) to present their cases in chief, rebut testimony, and cross-examine witnesses.
13 Scheduling depositions, reviewing evidentiary submittals, and distributing documents to
14 additional parties is unwieldly and disruptive, and detracts from the true parties’ ability to
15 develop and present their cases. See, Sanders v. Pacific Gas & Elec. Co., 53 Cal.App.3d 661,
16 669 (1975) (“An intervention will not be allowed when it would retard the principal suit.”).

17 As indicated above, if the Regional Board’s standard for designation of parties is
18 whether they possess an “intense interest in the issues” of this proceeding, then the number of
19 potential parties to these proceedings is infinite. Numerous trade groups, associations, and other
20 entities undoubtedly have an intense interest in these proceedings and have been following them
21 closely. If the Regional Board is willing to extend its same standard for intervention to these
22 entities, they likely will exercise their right to generally challenge the Regional Board’s technical
23 report, Draft CAO, and overall approach. The generalized but intense interest of these industry
24 groups and private entities is no different than Bay Council’s, and the types of testimony they
25 might present are no different from that which Bay Council is capable of presenting. It seems
26 clear that, taken to its logical conclusion, allowing these types of groups full party status, when
27 they have no “legal interest” at stake, will unnecessarily impair “the orderly and prompt conduct
28 of the proceeding,” whether their position is for or against the Draft CAO. More importantly, the

1 “interests of justice,” from the perspective of both the Regional Board and the PRPs, are
2 impaired if the time the true parties have to present their cases is disrupted or whittled away by
3 the participation of groups like Bay Council whose legal rights or duties are not affected by these
4 proceedings.⁸ Thus, the third prong of the APA intervenor standard provides additional reason
5 why Bay Council and other similarly situated groups should only enjoy “interested person”
6 status in these proceedings.

7 Bay Council and similar groups need not be excluded from these proceedings.
8 They are free to participate as interested persons. The Regional Board has the right to allocate
9 additional time at the hearing to those interested persons whose interest in these proceedings is
10 particularly “intense.”

11 **2. No Other Person That Is Not Potentially Subject To The Terms Of**
12 **The Draft CAO Should Be Permitted To Intervene In These**
13 **Proceedings**

14 All of the reasons given above as to why Bay Council fails the statutorily-
15 mandated standard for intervention as a party would similarly apply to other groups that are not
16 likely to be “substantially affected” by these proceedings. Granting party status to *any* person
17 that is not potentially, substantially obligated under the terms and conditions of the Draft CAO
18 would unnecessarily disrupt the orderly and prompt conduct of the proceeding.

19 This is not to say that only persons who can potentially be made to “cleanup and
20 abate” can intervene in the proceedings. For example, an appropriate use of the right of
21 intervention in this proceeding might be where one of the parties at whom the Regional Board’s
22 action is directed had previously contracted with a third person who indemnified the named party
23 for all costs incurred respecting cleanup of sediments. That third person’s financial interest in
24 the outcome of the proceedings might be a legitimate reason to allow the third person to
25 intervene. Another example of proper intervention may be where cleanup actions potentially

26 ⁸ The injustice and potential disruption to the parties named in the Draft CAO is magnified when
27 one considers the fact that Bay Council is merely an umbrella organization for numerous
28 environmental groups. If the Regional Board grants Bay Council party status, it is effectively
granting party status to numerous interested persons, none of whom have “legal rights” at
stake in these proceedings.

1 prescribed by the Regional Board could directly disrupt the person's legal right to conduct
2 business (e.g., the cleanup activities interfered with an entity's ability to conduct business at the
3 10th Avenue Terminal). However, Bay Council and similarly situated groups cannot demonstrate
4 that they possess these types of interest, let alone that the interests would be substantially
5 affected by these proceedings. Unless a person will potentially have to spend money, take
6 action, or forego rights or privileges as a result of these proceedings, they should not be afforded
7 party status.

8 **3. To The Extent The Regional Board Proposes To Designate Additional**
9 **Parties To These Proceedings, NASSCO Must Have A Full**
10 **Opportunity To Oppose Such Designations**

11 According to the Proposed Procedures (at page 3), other persons wishing to
12 participate in the proceedings as "Parties" must submit a written request for designation as a
13 party by 4:00 p.m. on the second Friday following "promulgation" of the Procedures. By
14 "promulgation," it not clear whether the Board intends for the deadline to be the second Friday
15 after circulation of these Procedures on July 14, 2005, or the second Friday after "adoption" of
16 the Procedures. Regardless, any person submitting such a request (more properly referred to as a
17 motion for intervention) should be obligated to serve a copy of the motion on NASSCO and all
18 other parties.⁹ Cal. Gov't Code § 11440.50(b)(1), (2). At a minimum, the Board should
19 promptly furnish all parties a copy of any motion received, including any post hoc request
20 received from Bay Council.

21 Due process and the APA then require that NASSCO and the other parties be
22 given an opportunity to object to any motions for intervention, both in writing and at a hearing
23 before the Regional Board members that will be making the determination on the motions.

24 In its determination on the motion, the agency cannot merely provide a one-
25 sentence explanation asserting that the intervenor has an "intense interest," or give a footnote
26 explanation in a hearing notice. Rather, the APA requires that "[a]s early as practicable in

27 _____
28 ⁹ Under the current Proposed Procedures, only parties have to serve copies of documents on
other parties. By definition, persons attempting to intervene in the proceedings would be
relieved of this obligation since they are not parties.

1 advance of the hearing the presiding officer shall issue an order granting or denying the motion
2 for intervention, specifying any conditions, and briefly stating the reasons for the order . . . The
3 presiding officer shall promptly give notice of an order granting, denying, or modifying
4 intervention to the applicant and to all parties.” (§ 11440.50(d)) This order will provide the
5 basis upon which NASSCO and other parties can challenge, if necessary, the designation of
6 additional parties or the conditions imposed on intervening parties.

7
8 **III. CONCLUSION**

9 As currently written, the Draft CAO contemplates a tremendous and unjustified
10 commitment of time, money, and resources from the parties at whom it is directed, and the
11 potential for large-scale disruption of human activity and the marine environment in the vicinity
12 of the shipyard. With so much at stake, it is absolutely critical that the Regional Board grant
13 NASSCO every procedural right due to it under the federal and state constitutions, and
14 applicable statutes and regulations. The only way the Regional Board can guarantee a fair and
15 just proceeding is by affording NASSCO and other potentially responsible parties full procedural
16 due process. And the only way the Regional Board can guarantee full procedural due process is
17 by responding to the concerns raised in these Objections, and modifying the Proposed
18 Procedures accordingly.

19 For the foregoing reasons, NASSCO respectfully requests that the Regional Board
20 grant the motions and objections that are requested herein.

21
22 Dated: August 3, 2005

Respectfully submitted,

23 LATHAM & WATKINS LLP

David L. Mulliken

24 Kelly E. Richardson

25
26 By 

David L. Mulliken

Attorneys for Respondent
27
28

BINGHAM McCUTCHEN

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August 3, 2005

Via E-Mail and U.S. Mail

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**Re: BP Comments on Proposed Procedures for Issuance of
 Cleanup and Abatement Order No. R9-2005-0126**

Dear Mr. Robertus:

BP West Coast Products LLC, (referred to in this letter, together with its predecessors in interest, as "BP")¹ appreciates this opportunity to submit comments to the California Regional Water Quality Control Board, San Diego Region ("Regional Board") on the Proposed Procedures for Issuance of Cleanup and Abatement Order No. R9-2005-0126 ("Proposed Procedures"). BP previously has submitted comments on the Regional Board's Tentative Cleanup and Abatement Order No. R9-2005-0126 ("Tentative Order") to named "Dischargers" to clean up and abate contaminated marine sediments in San Diego Bay within and adjacent to the NASSCO and Southwest Marine leaseholds ("Shipyard Sediment Site").

BP appreciates the Regional Board's attempts to define the general manner and framework of future proceedings on the Tentative Order through the Proposed Procedures. However, we remain concerned that certain aspects of the Proposed Procedures fail to adequately protect the procedural rights of the Dischargers, and/or fail to reflect the appropriate requirements of the California Administrative Procedure Act ("APA") and/or the applicable requirements contained in Title 23 of the California Code of Regulations ("CCR"), Division 3, Chapter 1.5, Sections 648 et seq.

- As an initial matter, BP reserves its rights under federal and state constitutions, laws, regulations and other authority applicable to the Proposed Procedures, including, but not limited to, the California APA (Cal Gov. Code §§ 11400 et seq. & 11513); Title 23 of the CCR, Division 3, Chapter 1.5, Sections 648 et seq.

¹ BP West Coast Products LLC is the current owner of the terminal located at 2295 E. Harbor Dr., San Diego, which is referred to incorrectly as the "ARCO Terminal" in the Tentative Order. The Tentative Order also incorrectly identifies BP as the "parent company and successor to Atlantic Richfield Company."

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To the extent the Proposed Procedures fail to meet requirements contained in these or other applicable authorities, BP reserves the right to raise these compliance issues in this and any future proceedings concerning the Tentative Order and any final cleanup and abatement order ("CAO") issued by the Board.

- The Regional Board should be included as a "party" to these proceedings, pursuant to the APA definition of "party" as including "the agency that is taking action." *See* Cal. Gov. Code § 11405.60. The Regional Board should amend the Proposed Procedures to clarify that it is a "party" and subject to the same legal and regulatory requirements as other "parties" to the matter.
- BP is concerned that the Proposed Procedures do not adequately define the role of the Executive Officer in this matter, nor do they adequately ensure a fair separation of advisory and advocacy functions. California law requires that, for reasons of ensuring due process, "the adjudicative function [of the Board] shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30 [addressing presiding officers]" Cal. Gov. Code § 11425.10(a)(4). The Executive Officer has been immersed in the investigatory and advocacy side of this matter from its inception, working closely with Staff on substantive technical issues that appear to fall under the responsibility of the "Sediment Site Cleanup Team" described in the Proposed Procedures. Yet, the current version of the Proposed Procedures also would allow the Executive Officer to participate on the "Advisory Team" advising the Regional Board in its deliberations on the evidence. This "combination of prosecutorial and adjudicative functions is the most problematic combination for procedural due process purposes" (*see* *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal. App. 4th 81, 93), and the Proposed Procedures should be revised to clarify that the Executive Officer's role is confined to the "Cleanup Team," not also the "Advisory Team."
- BP requests that the Regional Board amend the Proposed Procedures to more explicitly address the due process rights of parties to conduct discovery as required, including the right to subpoena documents and witnesses, depose and cross-examine witnesses, and request full disclosure of documents and evidence relied upon by the Regional Board or its staff (including internal communications germane to the proceedings). California law specifically allows in this type of matter for depositions (*see* Cal. Water Code § 1100) and other discovery necessary to ensure due process (*see* *Mohilef v. Janovici* (1996) 51 Cal. App. 4th 267, 302). Such discovery should assist the Regional Board in determining (among other things) whether sufficient evidence exists to name certain parties as "Dischargers," whether a CAO is justified at all, and if so, what type of cleanup levels and procedures should be considered in this matter.
- While the Proposed Procedures allow for submittal of testimony and other evidence on "What Persons Should Be Required to Provide Cleanup and Abatement for Waste Discharged to, or Deposited in, Marine Sediments of San

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Diego Bay," BP is concerned that the Proposed Procedures do not provide for a separate, threshold determination of whether the parties currently named as "Dischargers" in the Tentative Order are properly named in the Order. BP previously has commented to the Regional Board that there is insufficient evidence for BP to be named as a "Discharger," and other parties have made similar arguments that they should not be named in the Tentative Order. Resolution of this critical question early in the process could allow certain parties to be removed from the Tentative Order, thereby avoiding an otherwise substantial devotion of time and resources discussing cleanup levels and abatement alternatives. It could also allow the Regional Board to conduct focused cleanup and abatement efforts with those parties actually responsible for the contamination involved.

- The issues for consideration in the development of any Cleanup and Abatement Order for the Shipyard Sediment Site cannot be artificially limited to the six issues described in the Proposed Procedures. Title 23 of the CCR, Section 647.3 places no limitations on the content of, or issues to be discussed in, comments on an agenda items before the Regional Board. *See* 22 CCR § 647.3(a) ("Any person may submit comments in writing on any agenda item.") In particular, the named "Dischargers" have a due process right to provide comments on any issue relevant to the proceeding before the Regional Board, including whether evidence of general industry practices is sufficient to support Regional Board findings, whether chemical composition of identified contamination is consistent with potential sources of contamination from the alleged "Dischargers," and whether a Cleanup and Abatement Order is appropriate at all.
- BP appreciates the Regional Board's clarification of the participation of "Interested Persons" in this matter as including only the submittal of "written non-evidentiary policy statements or comments" (*see* Proposed Procedures at 8-9). BP requests that the Regional Board further clarify that, to the extent "Interested Persons" submit policy statements or comments that include evidence or submittals intended to be included in evidence, those parties will be subject to cross-examination as the regulations require. *See* 23 CCR § 648.1(d) ("[p]ersons presenting nonevidentiary policy statements will not be subject to cross-examination . . .")

Finally, in addition to these comments, BP reserves the right to join in and/or incorporate by reference comments or objections made by other parties, Dischargers and interested persons in this matter. BP further reserves the right to offer testimony, exhibits and/or other evidence on those issues, or the issues raised in this comment letter, at the August 10 Regional Board meeting on the Proposed Procedures. We also reserve the right to submit additional evidence to the Executive Officer or to the Board as appropriate in future proceedings.

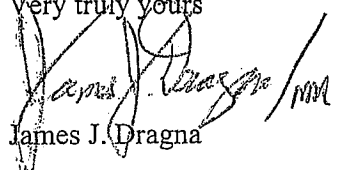
BP again thanks the Regional Board for consideration of these comments, and continues to look forward to working closely with the Regional Board and its staff on issues related

John H. Robertus
August 3, 2005
Page 4

to the proposed procedures and any resulting process to consider an Order for Abatement for the Shipyard Sediment Site. We look forward to addressing these issues in person at the Regional Board meeting on August 10, 2005.

Very truly yours

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James J. Dragna

Enclosure



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8/4

Mike McCann
plz ensure this is mailed
to all members for August meeting.

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August 3, 2005

Via Facsimile (858) 571-6972,

Electronic Mail (rb9agenda@waterboards.ca.gov;

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First-Class Mail

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Attention: Agenda for Sediment Cleanup

Re: Tentative Cleanup and Abatement Order No. R9-2005-0126:
Comments for August 10, 2005 Public Workshop Agenda Item 12(c)

Dear Mr. Robertus:

I write on behalf of Chevron USA, Inc. ("Chevron"). We understand that National Steel and Ship Building Company ("NASSCO") is submitting comments on Agenda Item 12(c) through its counsel, Latham & Watkins. We believe some or all of the comments made on behalf of NASSCO also apply to Chevron. Chevron hereby joins in, adopts and incorporates by reference here, the Statement of Objections to Proposed Procedures ("Objections") submitted today on behalf of NASSCO. Chevron requests that these Objections be considered as also having been made by, for and on behalf of Chevron, just as if Chevron's name were substituted for NASSCO's name throughout the Objections.

Sincerely,

Christopher J. McNevin



Pillsbury
Winthrop
Shaw
Pittman LLP

Mr. John H. Robertus
California Regional Water Quality Control Board, San Diego Region
Attention: Agenda for Sediment Cleanup
August 3, 2005
Page 2

cc: Mr. Tom Alo
Vincent M. Gonzales, Esq., Sempra Energy
James J. Dragna, Esq., Bingham McCutchen LLP - BP/Atlantic Richard
Captain A. J. Gonzales, Department of the Navy
Ms. Karen Henry, City of San Diego
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SAN DIEGO REGIONAL
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2005 AUG -4 P 3:37

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

REGION 9

IN THE MATTER OF:

CLEANUP AND ABATEMENT ORDER NO.
R9-2005-0126; CITY OF SAN DIEGO, ET AL,

Case No. ORDER NO. R9-2005-0126

OBJECTIONS TO PROPOSED
PROCEDURES

Public Hearing Date: August 10, 2005

INTRODUCTION

The City of San Diego has reviewed the procedures proposed by the Cleanup Team in their submittal dated July 14, 2005, and the Statement of Objections submitted by NASSCO on August 3, 2005. While the Cleanup Team's proposal provides a useful framework for the procedures to be applied in this proceeding, we generally agree with NASSCO that the proposed procedures are flawed. The areas that are especially problematic are addressed below.

OBJECTIONS

As a preliminary matter, the proposed procedures are submitted under the signature of David Barker, who is purportedly supervising the "Cleanup Team." The proposed procedures, however, do not read as a proposal but as a foregone conclusion as to what will occur at the pre-hearing conference. The City generally objects to the procedures to the extent that it appears the Cleanup Team is writing procedures for the Board's use.

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2 **I.**
3 **DEADLINES FOR SUBMITTING EVIDENCE AND ARGUMENT CANNOT BE**
4 **REASONABLY DETERMINED UNTIL AFTER THE TECHNICAL REPORT IS**
5 **RELEASED**

6 As correctly noted in NASSCO's statement of objections, due process in administrative
7 proceedings is a balance – the agency has the flexibility to proscribe procedures but those
8 procedures must ensure that the subjects of the proceeding can meaningfully participate. *See,*
9 *e.g., Mathews v. Eldridge*, 424 U.S. 319 (1972).

10 As applied to this tentative Cleanup and Abatement Order, the parties named in the order
11 cannot provide an accurate assessment of what procedures will be necessary to meaningfully
12 participate in the Board's proceedings until they have reviewed the complete Technical Report.
13 In the absence of the report, the Regional Board will be forced to sacrifice it's flexibility to ensure
14 that constitutional rights are not impinged, which may result in unnecessary delays. The
15 approach that maintains the Board's flexibility in proscribing procedures while not impinging on
16 due process is to set the appropriate procedures in a pre-hearing conference that occurs a short but
17 reasonable time after the Technical Report has been released, such that the parties can develop a
18 focused response strategy and request only those procedures necessary to meaningfully
19 participate in this process.

20 **II.**
21 **THE PROPOSED LIST OF SUBJECTS IMPERMISSIBLY LIMITS EVIDENCE AND**
22 **ARGUMENT**

23 The broadest standard for the admission of evidence is relevance. Relevance is a fluid,
24 but not boundless concept. In complex proceedings, where there are multiple parties and multiple
25 theories of liability, what will be relevant cannot be determined by the mechanical application of
26 a list issues. The parties must be able to submit evidence and argument regarding relevant,
27 collateral matters that may not fit neatly into the concepts formulated at the outset of the
28 proceedings. Thus, to the extent that the list proposed by the cleanup team may be used to
exclude otherwise relevant evidence, such a proposal is objectionable.

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8 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

9 REGION 9

10 DECLARATION OF
11 SERVICE BY MAIL

ORDER R9-2005-0126
IN THE MATTER OF CLEANUP AND
ABATEMENT ORDER NO R9-2005-0126; CITY
12 OF SAN DIEGO, ET AL ,(SAN DIEGO BAY),

13 I, Marie Moseka, declare that I am, and was at the time of service of the papers herein
referred to, over the age of eighteen years and not a party to the action; and I am employed in the
14 County of San Diego, California, in which county the within-mentioned mailing occurred. My
business address is 1200 Third Avenue, Suite 1620, San Diego, California, 92101. I served the
15 following document(s): **OBJECTIONS TO PROPOSED PROCEDURES**, by placing a copy
thereof in a separate envelope for each addressee named hereafter, addressed to each such
16 addressee respectively as follows:

17 Mr. Christopher J. McNevin
18 Attorney for Chevron
Pillsbury Winthrop Shaw Pittman LLC
19 10250 Constellation Blvd
Los Angeles CA 90067-6221

Mr. Roy Thun
BP/Atlantic Richfield Company
6 Centerpointe Drive
La Palma, CA 90623-1066

20 Mr. Vincent M. Gonzales
21 SDG&E Sempra Energy
555 West Fifth Street, Suite 1400
22 Los Angeles, CA 90013-1001

Mr. Brian Gordon
Department of the Navy
Environmental Department N45
Commander Navy Region Southwest
33000 Nixie Way, Building 50, Suite 326
San Diego, CA 92147-5100

23 Mr. H. Allen Fernstrom
24 Marine Construction & Design Company
25 2300 West Commodore Way
26 Seattle, WA 98199

Laura Hunter
San Diego Bay Council
Environmental Health Coalition
1717 Kettner Blvd #100
San Diego, CA 92101

1 Bruce Reznik
2 Baykepper
3 2924 Emerson St. Suite 220
4 San Diego, CA 92106

Ed Kimura
Sierra Club
3820 Ray St.
San Diego, CA 92104


4 Mr. Michael Chee
5 National Steel and Shipbuilding Company
6 P O Box 85278
7 San Diego, CA 92186-5278

Mr. Sandor Halvax
Southwest Marine Inc.
P O Box 13308
San Diego, CA 92170-3308

7 Mr. Scott Tulloch
8 City of San Diego
9 Metropolitan Wastewater Department
10 9192 Topaz Way
11 San Diego, CA 92123

11 I then sealed each envelope and placed it for collection and mailing with the United States
12 Postal Service this same day, at my address shown above, following ordinary business practices.

12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct. Executed on August 4, 2005, at San Diego, California.

14 
15 Marie Moseka

16 **PROOF OF SERVICE BY MAIL**
17 **C.C.P. §§ 1013(a); 2015.5**
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JML 8/3

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August 3, 2005

VIA FACSIMILE AND U.S. MAIL

Mr. John Robertus
 Executive Officer
 California Regional Water Quality Control Board
 San Diego Region
 9174 Sky Park Court, Suite 100
 San Diego, California 92123-4340

Re: Proposed Procedures for Issuance of
 Cleanup and Abatement Order No. R9-2005-0126

Dear Mr. Robertus:

This letter provides the comments of BAE Systems San Diego Ship Repair Inc. (formerly Southwest Marine, Inc.) on the proposed procedures for Cleanup and Abatement Order No. R9-2005-0126 ("proposed procedures"), published for comment by the Regional Water Quality Control Board's staff on July 14, 2005.

BAE Systems endorses all the comments and objections to the proposed procedures that have been filed by National Steel and Shipbuilding Company ("NASSCO"). BAE Systems agrees with NASSCO that the complexity of the issues, the very significant financial implications for the affected dischargers, and the equally significant precedential effects of a final decision in this matter for future sediment remediation elsewhere in San Diego Harbor and in other California coastal waters mandate the adoption of procedures that fully comply with all constitutional and statutory requirements, including discovery, cross-examination, and adequate opportunity to present evidence. The July 14, 2005 proposed procedures do not satisfy these requirements and do not adequately protect the rights of the parties potentially subject to a final Cleanup and Abatement Order. Therefore, the proposed procedures should be modified and expanded as NASSCO's objections suggest.

Respectfully submitted,

MCKENNA LONG & ALDRIDGE LLP

By: 

Christian Volz
 Attorneys for BAE Systems
 San Diego Ship Repair Inc.

SF:27189502.1